

A Despotism of Law

*Crime and Justice
in Early Colonial India*

Radhika Singha

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Preface

When T.B. Macaulay enthused about formulating a penal code for India, it was as a project which had interested 'reflecting and reading men' in Europe since Beccaria's treatise.¹ And yet he also said it was an enterprise 'which specially belongs to a government like that of India: to an enlightened and paternal despotism.'² Authoritarian government and its corollary, the absence of a developed and contentious Indian public opinion around questions of criminal law, was what Macaulay counted on to give him a free field for experimentation.³ The existing body of criminal law which he wanted to sweep away has been described as an Anglo-Muhammadan construct,⁴ assembled over the preceding half century from various modifications of the Islamic law, supplemented by Company regulations, and clarified by various 'constructions' and circular orders. Macaulay and the other law commissioners criticized this penal law for its variation from one Presidency to another, imprecision, and the inconvenience of working through references to Islamic law.⁵ Yet these imperfections could also be

¹ Minute by T.B. Macaulay, 4 June 1835, Board's Collections (BC) F/4/1555, no. 63507, 1836-7, India Office Library and Records (IOL); also T.B. Macaulay to James Mill, 24 August 1835, in T. Pinney (ed.), *Letters of T.B. Macaulay*, III, 1976, pp. 146-7. Henceforth, all manuscript references pertain to the IOL, unless otherwise stated.

² 1833, *Hansard debates*, cited in Janaki Nair, *Women and law in Colonial India*, 1996, p. 29.

³ J.F. Stephen praised the 'simple natural' style of legislation in the Indian Penal Code but admitted it could not be employed in England: 'It is useful only where the legislative body can afford to speak the mind with emphatic clearness, and is small enough and powerful enough to have a distinct collective will and to carry it out without being hampered by popular discussion.' *A history of the criminal law of England*, III, 1883, p. 302.

⁴ Cf. R.W. Wilson, *An introduction to the study of Anglo-Muhammadan law*, 1894.

⁵ Indian law commissioners to Governor General in Council (GG in C), 14 October 1837, *Parliamentary papers* (PP), 1837-8, vol. 41, pp. 466-8.

viewed as the historical trace of the points of retreat and accommodation in the formation of the colonial state.

Such reminders could hardly be flattering for a colonial authority now intent on projecting itself as a firm and impartial law-giving despotism. Yet, the draft penal code of 1837, which the law commissioners presented as the product of universal principles of jurisprudence, also had to build some discursive bridges with the religious and social norms of the subject population.⁶ At the same time the story of early colonial law was never only that of an accommodation with existing legal norms. The Company's regulations had formalized substantial areas of executive and judicial discretion, and some of these provisions were also assimilated in the draft penal code, even though the law commissioners proclaimed the ideal of curtailing arbitrary authority.⁷

This book explores the penal law of early Company rule in India to understand the range of social transactions which shaped the process of colonial state-formation. Law-making is treated as a cultural enterprise in which the colonial state struggled to draw upon existing normative codes — of rule, rank, status and gender — even as it also re-shaped them to a different political economy with a more exclusive definition of sovereign right.

Earlier histories of British criminal law in India concentrated on its institutional structure. They also tended, by and large, to evaluate it as a modernizing endeavour, an aspect of the liberal reformist tendency of British rule. Criticism was usually reserved for aspects of the judicial structure considered expensive, time-consuming, and conducive to litigiousness. I argue that the legislative initiative cannot be traced only to various crises of colonial order, nor only to the inadequacy of particular laws, but that it also sprang from a constant reworking of the ambitions and perspectives of political authority and the forms in which this was to be communicated.

British definitions of criminal liability conceptualized a realm of juridical power, founded, in theory at least, on a notion of indivisible sovereignty and its claims over an equal abstract and universal legal subject. Integral to this notion of sovereign right was the contention that legitimate violence was the sole prerogative of

⁶ Cf. Radhika Singha, *A despotism of law*, Ph.D., 1990, pp. 182–90 for a fuller treatment of this theme.

⁷ Cf. chapter five.

the state.) The criminal regulations of the Company most clearly and rapidly outlined this claim, orienting it to the civil pacification of India. While the actual disarming of Indian society could be cautious and halting,⁸ the ambition behind the idea of civil authority indicates that the Company's state was not just another imperium laid over a segmented political formation.⁹

In the view of British magistrates and judges, the Islamic law, which they claimed to be using for criminal justice, concentrated too narrowly on the consequences of the criminal act and on claims made by the injured parties for compensation or retaliation. What they wanted to communicate was the idea that the criminal act affected the interests of all, i.e. the public interest which the state represented, and punishment would be meted out in those terms. The criminal regulations of the Company formalized the claims of state upon individual subject, cutting through identities and claims which came in the way. This brought the law into contest with other sources of identity, other claims to a legitimate exercise of violence.

Law-making was therefore a process fraught with the potential of conflict. But in the early years of Company dominion it was expounded with a Burkean rhetoric of reconciliation with the 'laws and customs of the people'.¹⁰ As a mercantilist corporation

⁸ The values of armed honour were deeply ingrained in certain communities, in their pattern of settlement, domestic architecture, dress, and codes of rank and status. Disarmament also posed the problem of insufficient resources to defend the Company's subjects against armed attack. British magistrates were warned that there was no general sanction for knocking down *garhis*, fortifications. However, magistrates did begin to pass regulations against the carrying of arms in the larger towns, as in Banaras after the communal riots of 1809. Cf., *A despotism of law*, p. 90.

⁹ Frykenburg's perception of Company imperium as a structure completely dependent upon local and traditional power does not give sufficient weight to the centralization of armed force as it changed the old order, or to the ideological dimensions of rule of law. 'Village strength in South India', in R.E. Frykenburg (ed.), *Land control and social structure*, 1969, pp. 243–4; 'Company Circari in the Carnatic', in R.G. Fox (ed.), *Realm and region in traditional India*, 1977, pp. 117–64, 163.

¹⁰ J.H. Harington argued that the framers of the Bengal 'code' of 1793 had approached legislation in the spirit of Burke, with an attitude of reconciliation towards the past, rather than in the spirit of the revolutionary French government. For that reason, he said, the Company had chosen to work through the Islamic law in its criminal courts. *An elementary analysis of the laws and regulations*, 1805–17, vol. 1, section iv, pp. 297–8.

committed to retailing profits overseas, the Company could not seek legitimacy through a comprehensive espousal of the distributive rituals of indigenous kingship.¹¹ Moreover these rituals underwrote a concept of sovereignty within which the attributes of kingly power, the right to wield force, administer justice and award punishment, could be layered or farmed out along with fiscal rights. This was a notion antithetical to the more bureaucratic and centralizing drives of the Company's administration and its concern to seal seepages of revenue along the branch lines of lordship. In place of this distributive component of kingship, what the Company built upon was a stronger core of institutional authority — the Bengal army and the judicial and magisterial structures of civil authority. Certain aspects of its claim to legitimacy were expounded through the assertion of a difference from past regimes. These were characterized as arbitrary despotisms while Company governance, though authoritarian — for that was what Orientals were used to — was said to be bound by law. In other respects, however, the Company searched for cultural moorings in the traditions of rule associated with the Mughal state and its regional successors. The criminal law, its machinery and procedure, was therefore tied up with earlier institutions, personnel and legal-sacral texts.

In his pioneering work on legal systems at the interface of state and society, Cohn emphasized a clash of values and a bipolarity of authority and norms between the indigenous and colonial legal systems.¹² He attributed the 'failure' of the British legal system in India to this clash.¹³ The way in which the colonizers themselves constructed Indian tradition has been the focus of more recent work inspired by Said's *Orientalism*, such as that of Lata Mani, who evaluates the production of an official discourse on sati,¹⁴ and of Gyan Prakash, who examines the way in which British officials

went about making the religious law on slavery 'visible'.¹⁵ The fundamental premise is that the colonizers constructed their knowledge of indigenous tradition in ways which confirmed and extended relations of domination and subordination. These studies have undermined simple polarities between the 'traditional' and the 'modern' or the 'introduced'. They have shown how certain aspects of law and tradition were privileged over others, and how symbols were lifted out of one context and placed in another, giving them a new meaning. Foucault's power-knowledge paradigm has inspired the study of other facets of colonial criminal justice.¹⁶ The categorization of certain communities as criminal tribes,¹⁷ and the conceptualization of a prison regime,¹⁸ have been evaluated as part of a project of disciplining and controlling the indigenous population.

I found it more useful to examine the construction of the colonial legal subject on an ideological terrain in which the state negotiated with existing normative codes to reorder them to law and civil authority, but also to establish circuits of communication with the ruled. Such strategies could have unpredictable consequences, reintroducing denominators of social and ritual identity into procedures which sought to define a universal legal subject. In the process, the field of meaning invoked by the citation of a particular symbol of traditional authority could not always be controlled and restricted to the specific objectives of the state. Nevertheless, the Company's subjects were also impelled to accommodate themselves to the law, whether as a frame of reference to make their claims upon the ruling power, or to devise ways to avoid an encounter with its agencies.

The artefacts and images of colonial civil authority, the permanent gallows, *phansitola*, *phansichauk*, and the jailroad left their mark on the municipal map.¹⁹ The baleful figure of the police *darogha* in popular skits, the jail sentence parodied as a festive journey to one's *sasural*, and the punishment of hard labour as

¹¹ The whiff of parsimony clung about Company rule despite the splendour of its military victories. The historian constantly encounters this allegation in the matter of well-paid posts for Indians, patronage for Indian artisans, and expenditure on public works and charity.

¹² Cf. B.S. Cohn, *An anthropologist among the historians*, 1987.

¹³ *Ibid.*, pp. 479, 589, 615.

¹⁴ Lata Mani 'Production of an official discourse on sati', *Economic and Political Weekly (EPW)*, xxi, 17 (26 April 1986), women's studies, ws 32-40; and 'Contentious traditions', in K. Sangari and S. Vaid (eds), *Recasting women*, 1989, pp. 88-126.

¹⁵ G. Prakash, *Bonded histories*, 1989.

¹⁶ Michel Foucault, *Discipline and punish*, 1977.

¹⁷ Sanjay Nigam, 'Disciplining and policing the "criminals by birth"', *Indian Economic and Social History Review (IESHR)*, xxvii, 2 and 3 (1990).

¹⁸ A. Yang, 'Disciplining "natives"', *South Asia*, x, 2 (December 1987), new series, pp. 28-45.

¹⁹ *Phansitola*, *phansichauk*: gallows quarter, gallows crossing.

sarkar ki naukari, indicate that the imagination of power was being re-shaped at various social levels.²⁰ The black humour which could characterize such assessments is evident in a sketch of a British trial executed by an Indian buffoon, a professional entertainer.²¹ The prisoner, about to enter on his defence, is interrupted by a servant who announces that dinner is ready. The judges start up and pronounce the prisoner guilty, condemn him to be hanged, and run off to table.²² Colonel Fitzclarence who described this skit said its very performance demonstrated the mildness of British rule, but it may have been an indictment of the far greater frequency with which the Company used capital punishment in comparison to Indian rulers.

The book begins with the Company's judicial reforms of 1772 in Bengal to understand the novel conceptions of sovereign right being set out. Shifting northwards along the axis of conquest, the next two chapters use the Banaras zamindari as a case study to examine the way in which civil authority and due process were evoked through a re-alignment of existing agencies of rule and a deployment of the cultural material at hand. The law relating to homicide is taken up to examine changing perceptions about the justice expected from the ruler. Criminal law defined a monopoly for the colonial state in legitimate authority to take life. It thereby implicated the judicial process in an effort to dominate a very complex terrain of claims and expectations. The Islamic law, as interpreted by the kazis and muftis in the criminal courts, was modified to this end, a process which has been assessed in an elegant and lucid monograph by Jorg Fisch.²³ Both his study and the relevant section of my book draw heavily upon Harington's early nineteenth-century exposition of this theme.²⁴

²⁰ Cf. Report of third judge, Calcutta Court of Circuit (CC), 15 October 1800, BC F/4/98, for an early characterization of the jail as *sasural*. *Sasural*: father-in-law's residence, used sardonically to suggest a lavish welcome. *Sarkar ke naukar*: employees of government, used in ironical self-reference by prisoners. *Darogha*: police constable.

²¹ Cf. Lt. Col. Fitzclarence, *Journal of a route across India*, 1819.

²² Ibid.

²³ J. Fisch, *Cheap lives and dear limbs*, 1983.

²⁴ J.H. Harington, *Elementary analysis*, vol. 1. J.H. Harington, registrar, then puisne judge and chief judge of the Sadar Diwani and Nizamat Adalat, 1796–1811, also orientalist and for some years honorary professor of the laws and regulations of the British government in India in the college of Fort William, *Dictionary of National Biography*, xxiv, pp. 389–90.

However, I have tried to cover this ground from the historian's perspective, whereas Fisch does so as a legal scholar examining the evolution of colonial criminal justice as a response to specific needs of law and order. His method assumes a basic conflict of interest between the victim and offender, and between the individual and society.²⁵ However, once we place these abstract categories in their historical and social setting it is difficult to understand their 'interests' through such oppositions. Cultural norms regarding family, community or patronal circle, and codes of sexual and social conduct, might well be shared between victim and offender. In addition, there are aspects of the colonial judicial process which make it problematic to identify the female subject squarely as victim or offender, because they elided her agency and subjectivity.²⁶ In the phraseology of colonial law, the claims of the state were public claims, in the sense of upholding the general interest,²⁷ but law-makers also had to contend with other formulations of societal good. For instance, indigenous potentates inflicted fines for witchcraft or fornication on behalf of public welfare, exercises which Company officials criticized as purely extortionate.²⁸

Fisch also seeks to skirt the zone of the ideological, whereas this is insistently present for the historian. For instance, he chooses equality before the law as one of the 'more workable and less ideological categories' for a comparison between two legal systems.²⁹ But the historical conjuncture at which an aspect of inequality is addressed brings us back again to the ideological. Slavery for instance continued to be recognized as a civil status till 1843, though the Company's regulations made the master criminally liable for inflicting death or serious injury upon his

²⁵ *Cheap lives*, pp. 8, 10.

²⁶ See chapter four.

²⁷ As for instance when the tax demands of the state were described as 'the financial claims of the public', Regulation 2, section 1, 1793 (Reg, s).

²⁸ See chapter one. Reg 8 of 1799 declared that the killing of a person on the allegation of witchcraft or sorcery was punishable as murder. However British magistrates could not entirely resist the social pressure for punitive action against alleged sorcerers. In the Kumaon hills they made those accused of sorcery give a penal bond that they would not molest the complainant with incantations. Cf. Gowan, Commissioner Kumaon, to Batten, Asst Commr Gharwal, 12 July 1837, Commr's office Kumaon (COK), Pre-Mutiny records, Judicial letters issued, Book V, Uttar Pradesh State Archives, Lucknow (UPSA).

²⁹ *Cheap lives*, p. 12.

slave. Conversely, Fisch rejects the concept of humanity as too general to be of use in comparing legal systems, but this concept has provided a focus for rich historical investigations of the penal reform movement in Europe and the anti-slavery campaigns.³⁰

The state's claim to a monopoly of legitimate violence also had to be exerted against patriarchal claims to control the labour, demeanour, sexual and reproductive capacity of the women of the household. The fourth chapter deals with the way in which patriarchal authority had to be re-conceptualized in conformity to rule of law, as the condition for authorizing its sway over a 'personal' and 'domestic' sphere. In place of a wider kin authority over the women of the family, criminal regulations outlined a narrower commitment to the husband's conjugal rights in the person of his wife. At the same time, a need to embed judicial procedures within a sense of social and moral order pushed magisterial authority to the support of the male 'head of the household' in managing a more diverse range of relationships. There were social pressures on the Company's government to make this endorsement, even though it had displayed some hesitation about assuming all the functions of moral regulation exercised by indigenous rulers.

This book discusses some of the issues involved in giving legal definition to the boundaries of the household and to norms about domestic relationships. An important concern at this time was of maintaining the productive stability of the labouring household against the threat posed by 'vagrancy' and famine.³¹ Yet as long as the Company extended legal recognition to slavery there was a tension between the ideal of maintaining the integrity of the household, and the existence of a public traffic in women and children which seemed to flow in and out of it. Once legal recognition was withdrawn from slavery, the guardianship of

³⁰ A. Haskell, 'Capitalism and the origins of the humanitarian sensibility', *American Historical Review*, part 1, 90, 2 (April 1985), pp. 339–61, part 11, 90, 3 (June 1985), pp. 547–66. R. McGowan, 'A powerful sympathy', *Journal of British Studies*, 25, 3 (July 1986), pp. 312–34. Fisch himself has been most skillful in the suspect zone of the ideological, in showing the subsidiary significance of humanity in early British evaluations of the Islamic law, their far greater concern to plug the loopholes it allowed to the offender, and yet the weight given to humanitarian concern in subsequent accounts of their intervention.

³¹ M. Anderson, 'Work construed', in P. Robb (ed.), *Dalit movements and the meanings of labour in India*, 1993, pp. 87–120.

fathers over children and of husbands over wives could be endorsed within a more safely domesticated household.

The recognition of slavery as a civil status till 1843 indicates that so long as the state's claim to a monopoly over force was not challenged, it could manoeuvre around the issue of legal equality. The book examines the extent to which concessions were made to 'rank and respectability', and to the authority of husband over wife, and master over servant, but also how a different standard of criminality came to be formalized around the unstable configurations of the thug gang or the 'dacoit tribe'. Instead of the principle that guilt stemmed from individual responsibility for a specific act, guilt was deduced here from membership of a 'criminal community'. Though it was acknowledged that these criminal communities were often knit into systems of power and patronage wielded by contentious landholding elites, these were not made the target of such special laws. An unequal application of the law was not the only issue here. I argue that these laws were also an aggressive abbreviation of judicial procedure which gave the stamp of due process to crude devices of policing and prosecution.

But the point at which these devices were given formal legal shape was also crucially related to a political elaboration of paramountcy expounded through the rhetoric of authoritarian reform. From the 1830s the mission of paramountcy was propounded through the notion of a universal standard of humanity. Themes such as sati, infanticide, the traffic in slavery, and 'cruel and barbaric punishments' were invoked to lay down norms of governance for Indian chiefs and rulers without an expensive commitment to direct administration. The strategic imperative, the search for defensible frontiers, has provided one explanation for the dynamic of imperial expansion. Other themes which have been addressed in this connection are the quest for trade and the drive to secure revenues for an expensive military machine.³² I have suggested that

³² R. Mukherjee, 'Trade and empire in Awadh 1765–1804', *Past and present*, 94 (1982), pp. 85–102. He also emphasizes the de-stabilizing effect of the subsidies exacted by the Company. Eric Stokes argued that the quest for political profit by private interests in the Company created a 'local sub-imperialism' which generated war and expansion. 'The first century of British rule in India', *Past and present*, 58 (February 1973), pp. 136–60, 142–3. Cf. also P.J. Marshall, 'British expansion in India in the eighteenth century', *History*, 60, 198 (February 1975), pp. 28–43; and C.A. Bayly, *Imperial meridian*, 1989, p. 10.

a geographically extensive and socially intensive dynamic of rule of law provides another facet to the expansionary momentum which drew Indian states into the fiscal and military orbit of the Company. In a sense colonial definitions of sovereignty and order were implicated in the creation of the constantly 'troublesome frontier' of British dominion, at which contending notions of territoriality, rule and allegiance had to be dealt with. Attempts to restructure trade routes, to control commodities such as opium and gain access to natural resources also threaded colonial charges of lawlessness against these polities.

The changes anticipated from the ending of the Company's trade monopoly and the closer association of its government with Parliament brought the sense of an 'age of reform' to the colony as well. This opened a conceptual space for wide-ranging discussions about the forms and symbols of rule. Among these the book examines the redefinition of relations of personal subordination such as slavery, the elaboration of the political terms of paramountcy, and a cluster of changes related to issues of penal policy. The Company's criminal regulations had tried to alter the scale of censure associated with certain acts to extend its own legal claims. However, in assessing the form and measure of punishment colonial lawmakers also had to take account of norms regarding behaviour appropriate to age, rank and gender. I have argued that, from the 1830s, official debates on penal policy indicate a stronger effort to reorder the identity of the offender in a more uniform and standardized way as the object of punishment. The punitive possibilities of separating the offender more rigidly from all the rhythms of the social and the familiar began to be explored through two related strategies: narrowing the role of public punishment in the penal design, and directing a closer attention to the jail regime — to the details of daily routine, labour and diet. To standardize the treatment of prisoners the state also explored various projects of modernity, drawing upon metropolitan experiments in penal technology such as the treadmill, and upon medical expertise and statistical information for an improved and yet avowedly humane prison discipline. Yet officials still struggled to anchor such projects within acceptable social and cultural forms; as when magistrates instructed to substitute cooked food served in messes in place of the money or rations distributed to prisoners, all proceeded by drawing up lists of castes which could eat together.

In India the emergent colonial state therefore sought reference points to indigenous 'law' with a persistence which drew the impatience of later writers of its history. But interwoven with this was an effort to enforce expanded concepts of state authority. Historians used to differentiate phases of the Company's administrative policies and certain key figures according to whether they followed an Orientalist policy of working through a reference to indigenous political, legal and social traditions, or asserted new principles of rule more boldly, that is the so-called Anglicist policy.³³ But there was little difference, for instance, between Hastings the Orientalist and Cornwallis the Anglicist about extending the legal and punitive claims of the state.³⁴ What was debated was the strategy to be used. Ought the government to transact with traditional symbols of power, constantly trying to reinterpret them in ways more appropriate to the new premises of sovereign right? Or should the Company press forward, establish its own symbols of legitimacy, and actively encourage a different sort of public opinion around them? In the epilogue I have argued that the Company's law-making in the 1830s indicates an effort to make its public authority more self-sustaining *vis-à-vis* Indian elites. The debates in official circles about the forms of public authority sharpened to a different pitch, even though the extent of institutional change was constrained by retrenchment, and by a continued anxiety about social reaction.

The Territorial and Administrative Framework

The boundaries of the Bengal Presidency which provide the administrative framework for this book extended over the regions of Bengal, Bihar and Orissa (1765), incorporated the Banaras zamindari in 1795, and reached westwards upto the Jamuna in the next phase of expansion (the Ceded and Conquered provinces, 1801–3). However, some of the areas subsequently added to the Presidency were not brought under the Bengal regulations, on the

³³ Eric Stokes, for instance, contrasted Hastings who wished to use Indian agency, with Cornwallis, who substituted British officials at the higher levels, and sought to align them, 'not only as individuals, but as a system of government to English constitutional principles.' *The English Utilitarians and India*, reprint, 1982, pp. 1–4, 7.

³⁴ See chapter three, also A. Aspinall, *Cornwallis in Bengal*, 1931, pp. 166–7.

argument that a simpler system resting on local usage was more appropriate for recently annexed territory, or unsettled areas, though officers were supposed to observe the spirit of the regulations.³⁵ However, such non-regulation tracts could become 'in fact a theatre for experiments of incipient legislation', as Shore noted for the Sagar and Narbada territories.³⁶

At the district level the first criminal court was that of the magistrate, whose jurisdiction was very limited at first, but was substantially extended in 1818. For more serious offences the magistrate committed prisoners for trial before the judges of the court of circuit who toured the district twice a year. The superior criminal court of the Presidency was the Nizamat Adalat at Calcutta, the court of revision and reference. Islamic law officers were appointed to the courts of circuit and to the Nizamat Adalat, usually from the kazi and the muftis of the district at the time of cession, who had to attend the trial and give a *fatwa* on the guilt or otherwise of the prisoner and on his sentence.³⁷ This framework was put in place under Cornwallis in 1790 and substantially modified only in 1829 under Bentinck, when the courts of circuit were abolished. Thereafter, criminal cases were supposed to be handed over to the commissioners of revenue and circuit, but since they were too burdened by revenue business, criminal justice was handed over to the district and sessions judge. Till 1834 the legislative activity of the three presidencies proceeded in considerable independence of each other, but the Charter Act of 1833 vested the Governor-General in Council with sole legislative authority for British territory in India, and added a law member to this body. The date which I have put down as a formal concluding point is that of Macaulay's draft penal code of 1837, though the discussion of penal policy and the abolition of slavery extends the time frame into the 1840s.

³⁵ The non-regulation tracts of the Bengal Presidency were Delhi (1803), Sagar and Narbada (1818), Assam, Arakan and Tenasserim (1824).

³⁶ F.J. Shore, Offg Commr, Sagar and Narbada territories to Secy, Sadar Board of Revenue, Allahabad, 7 May 1836, Home Misc. vol. 790, p. 422. The procedural flexibility enjoyed by the British political officers who administered this area allowed them to take short-cuts in the trial and conviction of suspected thugs, innovations subsequently given formal legislative expression. See chapter five.

³⁷ *Fatwa*: formal legal opinion by a *mufti*, a scholar of Islamic law.

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Abbreviations

AGG	Agent to the Governor General
BC	Boards Collections, IOL
BCrJ	Bengal (Criminal) Judicial Consultations, IOL and WBSA
BM	British Museum, London
BPC	Bengal Public Consultations, IOL
BRC	Bengal Revenue Consultations, IOL
BRJ	Bengal Revenue Judicial Consultations, IOL
CC	Court of Circuit
CO	Circular Order
COB	Commissioner's Office, Banaras
COD	Court of Directors
COFA	Circular Order, Faujdari Adalat, Madras
COG	Commissioner's Office, Gorakhpur
COK	Commissioner's Office, Kumaon
CONA	Circular Order of the Nizamat Adalat
COSFA	Circular Order, Sadar Faujdari Adalat, Bombay
Collr	Collector of district
Commr	Commissioner of division
CPC	<i>Calendar of Persian Correspondence</i>
CUP	Cambridge University Press
DR	Duncan Records, RAA
DPC	Draft Penal Code, 1837
GG	Governor General
GG in C	Governor General in Council
GOI	Government of India
GS	General Superintendent of Thuggee operations
IESHR	<i>Indian Economic and Social History Review</i>
IOL	India Office Library and Records, London
IPC	Indian Penal Code, 1860
JAS	<i>Journal of Asian Studies</i>
JRAS	<i>Journal of the Royal Asiatic Society</i>

LP	Lower Provinces
Magt	Magistrate of district
MAS	Modern Asian Studies
MSA	Maharashtra State Archives, Bombay
NA	Nizamat Adalat, Bengal Presidency
NANWP	Nizamat Adalat, North Western Provinces
NAR	Reports of cases in the Nizamat Adalat
NAI	National Archives of India, New Delhi
NWP	North Western Provinces
OUP	Oxford University Press
PMJ	Pre-Mutiny Judicial
PP	Parliamentary Papers, House of Commons
RAA	Regional State Archives, Allahabad
RB	Resident Banaras
Reg, s, cl	Regulation, section, clause
Regr	Register, Nizamat Adalat
SDA	Sadar Diwani Adalat, Bengal Presidency
Secy	Secretary
SNT	Sagar and Narbada Territories
SJ	Sessions Judge
SP	Superintendent of Police
T&D	Thuggee and Dacoity Department
TNA	Tamil Nadu State Archives, Madras
UPSA	Uttar Pradesh State Archives, Lucknow
WBSA	West Bengal State Archives, Calcutta
WP	Western Provinces

Glossary

Note: I have not used diacritical marks, but spelt the words as in J.T. Platts, *Dictionary of Urdu, classical Hindi and English*, London, 1884 and H.H. Wilsom, *A glossary of revenue and judicial terms*, 1865.

<i>abkari</i>	revenue derived from duties on liquor and drugs
<i>adalat</i>	court of law, uprightness
<i>adl</i>	justice, equity
<i>akubat</i>	punishment, torture
<i>amil</i>	revenue official, came to mean revenue farmer
<i>amin</i>	Indian officer in revenue or judicial court
<i>amla</i>	superior Indian officers of judicial or revenue court
<i>ashraf</i>	the genteel, the well-born and respectable
<i>arzi</i>	petition or representation
<i>babbaliya</i>	witness for hire around the courts
<i>bad-maash</i>	a person of bad character and livelihood
<i>bairagi</i>	a Vaishnavite ascetic
<i>banjara</i>	peripatetic grain, salt and cattle dealers
<i>barkandaz</i>	<i>barq-andaz</i> , a matchlock-man, guard, constable
<i>biradari</i>	or <i>baradari</i> , connections, kinsfolk
<i>canungo</i>	<i>qanungo</i> , keeper of district revenue records
<i>charakh-puja</i>	devotional swinging suspended by hooks
<i>chaudhuri</i>	headman
<i>chauki</i>	police post, customs post
<i>chaukidar</i>	watchman
<i>chauth</i>	a fourth
<i>chura</i>	sundries, miscellaneous duties
<i>dacoit</i>	bandit, gang robber
<i>dan</i>	donation
<i>darbar</i>	assembly, royal levee,

<i>darogha</i>	a manager, a police official
<i>dharna</i>	fasting before adversary to demand redress or payment of a debt
<i>dhoti</i>	a cotton wrap for the lower body
<i>diwani adalat</i>	civil court
<i>diya</i>	blood-money
<i>farman</i>	mandate, imperial order
<i>fatwa</i>	formal opinion by a <i>mufti</i> on Islamic law
<i>faujdar</i>	military commander of a district
<i>faujdari adalat</i>	criminal court
<i>filzamin</i>	surety for orderly conduct
<i>godna</i>	tattooing
<i>hadd</i>	prescribed penalties for acts forbidden by the Koran
<i>hakim</i>	governor, ruler, magistrate, the person in authority
<i>haq</i>	right
<i>hazirzamin</i>	security for attendance, bail
<i>hoormut</i>	esteem, honour
<i>ikrarnama</i>	deed of assent or acknowledgement
<i>inam</i>	land grant held free of revenue or at low rates
<i>jagir</i>	assignment of land revenue
<i>jati</i>	sub-caste, the endogamous commensal group
<i>kabuliyat</i>	deed of acceptance
<i>kachcheri</i>	a place for public business, a court, an office
<i>kazi</i>	qazi, Islamic judge and public notary, qazi-al quzat, head qazi
<i>khairat</i>	charity offered in thanksgiving
<i>khilat</i>	robe of honour bestowed by a superior on a dependant
<i>kiladar</i>	qaladar, superintendent of a fort
<i>kisas</i>	retaliation for killing or wounding, claimable by the aggrieved party or his heirs
<i>korah</i>	whip
<i>kotwal</i>	police chief and urban administrator
<i>kotwali</i>	a police pavilion, or office
<i>laundi</i>	slave girl, servant girl

<i>madrasa</i>	school, institution of theological learning
<i>mahajan</i>	a merchant, banker, trader
<i>mahzar</i>	a public attestation, a document attested by persons professing to be cognisant of a case
<i>malguzari</i>	government's revenue assessment
<i>malik</i>	patron, master, proprietor
<i>malzamin</i>	security for payment of revenue
<i>maulvi</i>	scholar and teacher of Islamic law
<i>mehtar,</i> <i>mehtarani</i>	sweeper, sweeperess
<i>mohalla</i>	urban residential neighbourhood
<i>muchalka</i>	undertaking
<i>mufassil</i>	interior, area away from the town or headquarters
<i>mufti</i>	scholar in Islamic law
<i>muharrir</i>	a clerk, a scribe
<i>mubtasib</i>	censor of morals and market inspector
<i>mujtahid</i>	interpreter of Islamic law and theology
<i>mukhtar</i>	manager of an estate, a pleader
<i>munsif</i>	subordinate civil judge of the lowest rank
<i>mustajir</i>	revenue farmer
<i>naib</i>	deputy
<i>nazim</i>	Mughal governor of a province
<i>nizamat</i>	government
<i>nizamat adalat</i>	the superior criminal court
<i>naukar</i>	servant, <i>naukari</i> , service
<i>pabikasht</i>	cultivation by non-resident tillers
<i>panchayat</i>	an arbitrate assembly
<i>pasban</i>	village watchman
<i>parwari</i>	village accountant
<i>peon</i>	a foot soldier, an orderly
<i>phansigars</i>	stranglers
<i>pultun</i>	platoon
<i>purbia</i>	from the east
<i>qasba</i>	small town
<i>rahdari</i>	a toll on goods in movement and travellers, road tax
<i>rais</i>	influential residents, chiefs
<i>razi-nama</i>	deed of agreement or mutual satisfaction

<i>rozina</i>	a daily allowance to religious mendicants and the poor
<i>sadar amin</i>	Principal Indian officer of civil court
<i>sadar diwani</i>	the superior civil court
<i>adalat</i>	
<i>sala, sasur</i>	brother-in-law, father-in-law, terms of abuse
<i>sanad</i>	title-deed, a document conveying rights
<i>sannyasi</i>	ascetic
<i>sarishtadar</i>	head Indian officer in civil court, record keeper
<i>sasural</i>	father-in-law's residence, ironical term for jail
<i>sayer</i>	<i>sa'ir</i> , taxes other than land revenue, transit duties
<i>sazawal</i>	officer appointed for revenue collection in place of landholder or revenue farmer
<i>sarai</i>	a shelter for travellers
<i>ser</i>	a measure of weight, one-fortieth of a <i>man</i>
<i>sharan</i>	refuge, sanctuary, protection
<i>sharia</i>	the religious law of Islam
<i>sharif</i>	a person of rank
<i>shikar</i>	hunting
<i>sipahi</i>	soldier, sepoy
<i>siyasat</i>	administration, also capital punishment
<i>subah</i>	province
<i>subahdar</i>	governor of province
<i>surat-i-hal</i>	report of a transaction or event
<i>takia</i>	seat of residence
<i>talabana</i>	daily fee payable to the officer serving summons
<i>tamasha</i>	spectacle, performance
<i>tarai</i>	Himalayan foothills
<i>tashir</i>	public humiliation as punishment
<i>tazir</i>	discretionary punishment for the reform of the offender
<i>tehsildar</i>	revenue collector for the <i>tehsil</i> , an administrative unit
<i>thagi</i>	inveigling, deceiving for criminal purposes, in Anglo-Indian parlance, ritualized murder and robbery
<i>thanadar</i>	police officer in charge of a <i>thana</i> , police post
<i>uchchakagiri</i>	petty pilfering

<i>ulama</i>	scholars and jurists of Islamic law and religion
<i>vakil</i>	agent, representative, later pleader, lawyer
<i>vywastha</i>	legal exposition
<i>zenana</i>	women's apartments
<i>zebanbundi</i>	oral deposition
<i>zina</i>	prohibited sexual intercourse according to the <i>sharia</i>
<i>zulm</i>	oppression

Chapter One

From *Faujdari* to *Faujdari Adalat*: The Transition in Bengal

The issue of criminal justice, wrote Jonathan Duncan, British resident at Banaras, was both 'momentous and delicate', being 'so novel in this part of the country for the attention heretofore paid to it'.¹ Duncan was echoing the feeling of many British contemporaries that one of the numerous deficiencies of criminal justice in Indian polities was that there simply wasn't enough of it.² Gholam Husain, an avid chronicler of those changing times, had his own assessment of the novelty of a *faujdari* separated from its military associations and re-shaped as a sphere of criminal jurisdiction under the Company's dominance in Bengal.³ The only office under the earlier Mughal administration which suggested itself as a similarly constricted sphere of authority was that of the *korwal* who policed the towns. The *faujdari* now, wrote Gholam Husain, 'consisted of little else than a discharge of a Cutvaul office, that is, in fining and killing and hanging and maiming and confining people.'⁴ It is evident that Husain regarded these as mean

¹ Jonathan Duncan, Resident at Banaras, 1787-94 (henceforth RB) to GG in C, 28 October 1788, Bengal Revenue Consultations (BRC) P/51/27, 28 November 1788, p. 490, IOL.

² Cf. GG Cornwallis' minute on justice, 3 December 1790, stating that neither the Mughal nor the Hindu administration had given adequate attention to criminal justice. BRC P/52/22, 3 December 1790, pp. 191-2. RB to GG in C, 28 October 1788, BRC P/51/27, 28 November 1788, regarding the Banaras Raj; W. Tennant, *Indian recreations*, II, second edition, London, 1804, p. 259 on Awadh; W.H. Tone, 'Illustrations of some institutions of the Mahratta people', *Asiatic Annual Register* (1798-99), pp. 124-51, 139, reporting that the Marathas had no notion of civil or criminal jurisprudence.

³ Saiyid Gholam Husain Khan, *Seir Mutaqherin*, trans. Nota Manus, 1789, reprint, Lahore, 1975. *Faujdari*: Military executive governance, which came to mean criminal justice under colonial rule. *Faujdar*: Military commander of a district under the Mughal administration.

⁴ *Ibid.*, vol. III, pp. 103, 80.

functions indeed when faujdari had once meant marching in military state to subdue 'overgrown' zamindars.⁵ The institution of a sphere of criminal justice under a civilian magistracy, distinct, in theory at least, from the summary measures of military governorship is the first subject of enquiry in this book. The regulations of 1772 inaugurated a process by which the colonial state claimed exclusive rights to judicial and punitive authority as the prerogative of sovereignty. These rights were moreover, distinguished from fiscal claims which could be farmed out or dispersed over the chain of social authority through which revenue-tribute was collected.

The judicial 'reforms' of 1772, according to the Committee of Circuit, were intended

to recur to the original principles and to give them that efficacy of which they were deprived by venal and arbitrary innovations . . .⁶

Both Hastings and Cornwallis claimed they were restoring the 'ancient constitution' in justice, merely introducing changes which would ensure its impartial and effective application.⁷ The suggestion was that Mughal agencies of justice had decayed because of the laxity and venality of regional rulers, whose powers had been usurped by zamindars and farmers of revenue. Hastings focussed on the centralist aspects of Mughal order structured around the figure of the *faujdari*, when he touched on the theme of criminal justice. It was the faujdar, the representative of the *nazim*, he contended, not the local raja or zamindar to whom the people looked for justice and protection.⁸ In contrast, his opponent Philip

⁵ Cf. *Seir*, vol. III, pp. 175-7 for one such rousing description. Of course, the decline of the Mughal faujdar had preceded the Company's ascendancy, with the expansion in the power of the revenue farmers and the emergence of large zamindaris in many regional states.

⁶ Committee of Circuit to Council at Fort William, 15 August 1772, in J.E. Colebrooke, *Supplement to A digest of the regulations and laws*, I, 1807, p. 8 (*Supplement*).

⁷ Cf. Warren Hastings (WH) to J. Dupre arguing that the Company had merely renewed the laws and forms of the past, with only such variations as were necessary to make them effective, 8 October 1772, in G.R. Gleig, *Memoirs of the life of Warren Hastings*, I, 1841, p. 263. Governor and Council at Bengal to the Court of Directors (COD), 3 November 1772, Seventh report from the Committee of Secrecy on the state of the East India Company, 6 May 1773, *Reports from committees of the House of Commons*, vol. IV, 1772-3, p. 346.

⁸ Hastings had discounted the idea put forward in the 'Sixth Report of

Francis had argued that the zamindars could be allowed to exercise magisterial authority.⁹ The other aspect of the critique of judicial arrangements was that even the Mughal regime was after all a despotism. In the absence of a regular system of law it had arbitrarily interfered in decisions, so that justice 'during the Vigour of the ancient Constitution was liable to great Abuse and Oppression.'¹⁰ Contemporary European views on the greater efficacy of fixed and immutable penalties, as against ancien regime practices of discretionary selection for punishment and 'cruel spectacles' were posed in India as a contrast between the arbitrary justice of the oriental despot and due process of law under the Company.¹¹ However, it was the laxity which indigenous rulers seemed to display in exercising their punitive rights, rather than the 'barbarity' with which they did so which drew the more strident criticism.¹² The Islamic law, as it was applied in the Company's criminal courts, was found wanting for a similar reason, for the constraints it seemed to place on the state's powers of prosecution and punishment.¹³

The Company's early regulations began to extend the punitive jurisdiction of the state against the punitive and restitutive claims

the Committee of Secrecy, 1773' that the judge of the criminal court in the districts was the zamindar or raja. Minute of 7 December 1775, in G.W. Forrest, *Selections from letters, despatches and other state papers*, vol. II, 1890, pp. 454-5. Cf. also W. Firminger, *Introduction to the fifth report*, 1917, pp. xliii-xlv.

⁹ For the views of Philip Francis, see Ranajit Guha, *A rule of property for Bengal*, 1963, reprint, 1982, pp. 111, 143, 151-2.

¹⁰ Seventh report, 6 May 1773, *Reports from committees of the House of Commons*, vol. IV, 1772-3, p. 324.

¹¹ Thomas Law sketched out the goal for judicial reform in the following terms: 'the certainty of suffering for proved offences operates more effectually to prevent commission than cruel punishment. When, therefore, a system is found easily to discover and quickly to make example, I hope that humanity will not be shocked by staked spectacles writhing in agony if superior judgement shall resolve that partial torture does not promote general security.' Thomas Law, *A sketch of some late arrangements*, 1792, pp. vii-viii.

¹² This was specially so in the matter of punishment for homicide. Cf. J. Fisch, *Cheap lives*, for a very deft exposition of this theme.

¹³ Hastings argued that government would have to intervene to ensure adequate punishment, because the Islamic law was 'founded on the most lenient principles and on an abhorrence of bloodshed.' Letter from WH, 10 July 1773, recorded on the progs of Council, 3 August 1773, *Supplement*, pp. 114-19.

of its subjects. The result was the emergence of a sharper distinction between criminal process for offences against 'public justice' and civil process to compensate for 'personal injury'. In fashioning these jurisdictions the Company also sought to distance itself from certain forms of moral and social regulation which had characterized the justice dispensed under pre-colonial regimes. Yet the new rulers would also draw upon some of the discretionary powers that they had castigated as a mark of despotic arbitrariness.

'Usurped' Prerogatives of Sovereignty?

The Mughal Order

Against these broad rhetorical flourishes with which indigenous regimes were both invoked and criticized, I have framed certain schematic questions about the circumstances in which the Company instituted its judicial arrangements. Authoritative answers to questions on pre-colonial theories of kingship and justice can come only from scholars of medieval history, but it was necessary to place the Company's critique in perspective. To what extent did the Mughal order, which the Company claimed to be restoring, rest upon a centralized exercise of justice and punishment?¹⁴ To what extent were offences tried by the *sharia*, as interpreted and administered by *kazis* and *muftis*?¹⁵ Did the farming out of judicial offices and the extensive use of fees and fines in the eighteenth century mean that the dispensation of justice rested on the ration-ale of revenue alone?

For the Mughal empire, public order consisted of keeping its own official and semiofficial agencies from ambitious forays outside their jurisdiction, and of keeping these agencies in place against the local *rajas* and *zamindars*.¹⁶ The rituals of personal justice which the

¹⁴ The role of the various non-official agencies through which the plaintiff sought redress, or which punished an offender for some breach of the social and moral code must be evaluated in the light of a body of work reassessing the extent to which Mughal authority rested on a centralized bureaucracy. Chetan Singh, 'Centre and periphery in the Mughal state: the case of seventeenth century Punjab', *MAS*, 22, 2 (1988), pp. 299–318; Frank Perlin, 'State formation reconsidered', part II, *MAS*, 19, 13 (1985), pp. 425–80; A. Wink, *Land and sovereignty in India*, 1986.

¹⁵ *Sharia*: the canon law of Islam; *kazi*: Islamic judge, also public notary.

¹⁶ See *Ruka'at-i-Alamgiri*, trans. J.H. Bilimoria, 1972, pp. 20, 57, 124, 289 for an expression of such ideas. It was in the same terms that the justice of

emperors dispensed as part of their daily routine, dramatized their role in keeping the various layers of the powerful to their proper limits. This was the protection which the emperor's justice gave to the weak, against the *zulm* of the mighty.¹⁷ In institutional terms this meant the maintenance of overlapping administrative agencies with separate routes of information to the emperor.¹⁸ But the empire also sought to sustain channels of communication with rural and urban notables, holding out honours, titles and promises of imperial support, in return for their identification with Mughal order and their assistance in revenue collection.¹⁹

The crucial executive and military unit for controlling the *zamindars* and policing the roads was the *faujdar's* jurisdiction, supplemented by *kilahdars* stationed in forts at strategic points.

quasi-independent *Nazims* was measured in Persian chronicles. Cf. A. Salam, trans., *Riyazu-s-Salatin by Gbulam Husain Salim*, 1902, pp. 276, 284.

¹⁷ *Zulm*: oppression. Francois Bernier, *Travels in the Mughal Empire AD 1665–1668*, ed. A. Constable, 1968, pp. 263, 360. The *darbar* as tribunal of justice allowed a very direct address from plaintiff to emperor and was conducted on arrangements very different from the formal etiquette of the *darbar* where nobles assembled. Cf. R. Orme, *Historical fragments of the Mughal Empire*, 1782, reprint, 1972, pp. 273, 285. Hajji Mustafa, the translator of the *Seir*, remarked that nowhere else were Princes and Ministers 'so inclined to put up with the murmurs, the reproaches, and even the foul language of their disappointed suitors.' *Seir*, vol. III, 1975, p. 158, n. *Darbar*: hall of audience, giving audience.

¹⁸ These included the several information agencies which were also expected to report any 'oppressive' conduct on the part of powerful officials: the *sawabnihnigars*, secret reporters, and the *waqi'ana'avis*, official recorders, in addition to which the emperor kept his own newsmen and spies. Cf. Z. Siddiqi, 'The Intelligence Services under the Mughals', *Medieval India, a miscellany*, Aligarh Muslim University, 1972, pp. 53–60. The *Diwani* office provided a fiscal check on the executive/military domain, i.e. that which was manned by the *subahdar*, governor, *naib nazim*, deputy governor, *faujdar*, and the *kilahdar*, the keeper of forts.

¹⁹ The *chaudhuri*, 'usually a member of a local warrior caste and dominant head of a stratified lineage', or the *chaudhuri* of the *sa'ir* revenues, drawn from some prominent merchant or banker of the town, undertook managerial responsibilities in revenue administration and rose to special status *vis-à-vis* their kinsmen or peers through imperial recognition. Cf. J.F. Richards, *Document forms for official orders of appointment in the Mughal Empire*, 1986, introduction, pp. 14–15. Also BRC P/5/52, 4 February 1789, pp. 283–5, for Ali Ibrahim Khan, the judge-magistrate of Banaras' description of the *chaudharies* of the markets as intermediaries between the state and the residents. *Sa'ir*: sayer, taxes other than land revenue, transit duties; *chaudhuri*: headman, of a village or of a merchant community.

The zamindars had to be kept in a state whereby they acknowledged imperial authority, paid their revenues, allowed the movement of treasure, and did not impose such heavy levies on trade and commerce as to deplete imperial revenues.²⁰ The principle on which the highways were kept safe was of enforcing liability through military force, from one level down to the other, from the faujdar and *thanadar* to the zamindar and his dependants. In theory, both were supposed to make good any loss if they could not produce the robbers.²¹ Mannuci reported that the faujdar was held responsible for robberies on travellers during the day, but if the traveller was robbed at night it was ascribed to his own negligence.²² In the cities too, the Mughal kotwal had a military contingent, but relied substantially on setting up a chain of interlocking securities in the *mobullas*, urban neighbourhoods, and on information-gathering from various occupational groups.²³

Military-Executive Authority and Legal Points of Reference

Mughal order over the countryside provided very little in the way of a judicial reference point for punishing offences which approximated to rebellion or refractoriness.²⁴ Highway robbery

²⁰ 'The different degrees of cooperation or resistance among the local zamindars, or differences in terrain helped to determine the extent of territory assigned to a faujdar.' J.F. Richards, Introduction, *Document forms*, p. 16.

²¹ Cf. Bond for the Position of Amin and Faujdar, *Document forms*, Nos 218b and 226b, for the zamindar, No. 220b. This provision was probably effective only if the owner was influential enough or could induce the faujdar to recover the amount from the zamindars: Cf. S.P. Sangar, *Crime and punishment in Mughal India*, 1967, p. 56. *Thanadar*: head of a police post.

²² Cited in S.N. Sinha, *Subah of Allahabad under the Great Mughals*, 1974, p. 100. At night the traveller was expected to find himself at a *sarai*, where influential zamindars were supposed to arrange protection, or at a fort or a town, one of the defensible points from which thanadars and faujdars made forays into the countryside to enforce revenue payment, or to punish banditry. Perhaps daylight robbery was assessed as an indication that the faujdar had lost his authority over local zamindars. *Sarai*: resthouse, halting place.

²³ Cf. Akbar's 'Farman of high dignity containing necessary commands and prohibitions issued to Nazims' c. 1588, in M.F. Lokhandwala (trans.), *Mirat-i-Ahmadi: A Persian history of Gujarat, Ali Muhammad Khan*, Gaekwad's Oriental Series, 146, Baroda, 1965, pp. 144-5; *Document forms*, 224a. C.A. Bayly, *Rulers, townsmen and bazaars*, 1983. *Mobullas*: urban residential neighbourhoods.

²⁴ Mughal *sanads* direct the faujdar and the zamindar to punish bands of 'miscreants' who committed theft and highway robbery, without asking them

within the Mughal polity was akin to rebellion, and the two terms were often used together in chronicles.²⁵ However, the Mughals and their successors in the regional states made some attempt to reserve the performance of executions, in particular, those of the spectacular variety handed out to rebels, for themselves. Akbar instructed nazims to 'abstain from skinning, trampling under feet of an elephant and similar punishments meted out by great kings.'²⁶

In urban centres the kazi's *kachcheri* provided a point of reference for invoking the sharia in the trial and punishment of offences.²⁷ The kazi had a special responsibility for the religious welfare of Muslim inhabitants. But he was also an imperial official in a very wide ranging sense, acting as a bridge between the sharia and the exigencies of administration.²⁸ But the degree to which the kazi was consulted depended on the significance of the case, and on the cooperation of executive authority, the nazim, faujdar, or kotwal. Zameeruddin Siddiqi cogently argues that if there was a head of the judicial administration in the province, it was the nazim rather than the kazi, for it was upto him to decide which cases he would transfer to the kazi and the kazi was, in general, expected to obey the orders of the nazim.²⁹

to refer the case to any other authority for trial. *Document forms*, 218b, 220b, for faujdar and zamindar respectively. However there was some effort to prevent officers from inflicting capital punishment unless immediate retribution was necessary. They were to send prisoners deserving of death to the imperial court. Cf. Akbar's farman, c. 1588, *Mirat*, p. 140; also *Document forms*, 217a and 218b.

²⁵ 'In the reign of Bahadoor Shah, the zamindars of the eastern districts... rose in rebellion, refused payment of revenue, and began to follow the trade of robbers.' F. Curwen (transl.), *The Bukharnamah*, 1875, p. 1.

²⁶ *Mirat*, 1588, p. 141. Cf. *Document forms*, 217a and 218b specifically addressed to faujdars.

²⁷ *Kachcheri*: a place for public business, a court, an office.

²⁸ The kazi had the scholarly assistance of the mufti in consulting the sharia to find a ruling appropriate to the case, but the final decision rested with him. Z. Siddiqi, 'The institution of the Qazi under the Mughals', *Medieval India, a miscellany*, vol. 1, pp. 240-59. Cf. also 'Manual of the duties of officers', dating to the early eighteenth century, which Jadunath Sarkar got from a Kayastha family of Patna district. This urges the mufti to read books on jurisprudence, and if the kazi gave a judgement opposed to all precedent, to advise him to consult a particular book. J. Sarkar, *Mughal administration*, 1920, p. 37.

²⁹ Z. Siddiqi, 'The institution of the Qazi'.

In the towns it was to the *kotwali chabutra* that people brought their complaints of theft, assault, and homicide.³⁰ In Orme's description: 'one wants assistance to take, another has taken a thief: some offering themselves for bondsmen; others called upon for witnesses . . .'³¹ The degree to which the kotwal associated the kazi with the trial and punishment of prisoners probably varied with the political backing which the kazi could marshal, and with the legal issues at stake in the dispute.³² But the kotwal exercised a primary judicial function insofar as he decided which of the parties brought before him were to be released and which to be sent to the kazi for trial.³³ Where assault or injury was linked to quarrels over marriage, inheritance, or property, the kazi's legal training would help to sort out such matters, particularly if the disputants were Muslims. Such cases were not divided along the lines of civil right and criminal offence but treated as issues of somewhat the same kind: the injured party or his heirs had to receive 'satisfaction' and the cause of the dispute had to be sorted out.

Mughal agencies could and did sometimes adopt a punitive approach, even when offences against property and person did not directly concern the revenue tribute or the maintenance of order. The authority of a well-entrenched Mughal *hakim* could also be

³⁰ But the kotwal was also supposed to take his own measures for apprehending thieves, pickpockets and brawlers. 'At places of sale and purchase, at places of entertainment where spectators assemble, keep watchmen to seize the pickpockets and snatchers up of things and bring them to you for punishment.' 'Manual of the Duties of Officers' in J. Sarkar, *Mughal administration*, p. 95. *Kotwali chabutra*: police pavilion.

³¹ *Historical fragments*, 1974, p. 290.

³² The sanad of appointment for the kotwal said he was not to act at his own discretion in imprisoning men accused of peculation, or releasing them, but to carry out the written orders of the kazi. J. Sarkar, *Mughal administration*, p. 97. Cf. *Document forms*, 224a: 'He should implement the signed verdict of the judge (qazi) regarding the retention or release of persons imprisoned for crimes . . .'

³³ In the 'Manual' cited by J. Sarkar, the kotwal was to examine the prisoners, and report the cases of those he considered innocent to his superior (the nazim?) and secure their release. The guilty could be fined and released, and if they were penniless their case was to be reported. A statement of those who deserved to be kept in prison was to be sent to the officers of the canon law (the kazi and mufti) and their signed orders were to be carried out. *Mughal administration*, pp. 93-4.

drawn into forms of community restitution and retribution.³⁴ However the wishes of the plaintiff, and the arrangements he concluded with the offender for restitution, were usually taken into account in determining the outcome. In general, the just kazi was described as one who encouraged contending parties to come to a compromise, not one who only decided responsibility and awarded punishment.³⁵ If the kazi tried an offence 'of blood' by the procedures of the sharia, he could conclude that the heirs of the victim were entitled to *diya*, blood-money, or to *kisas*, retaliation, i.e. to the life of the slayer. However, the heirs of the deceased could commute capital punishment to blood-money, or even pardon the slayer entirely. In such cases of personal injury, where the victim or his heirs signed a *razinamah* with the offender, Mughal officials, as also Hindu rulers, would not usually award capital punishment.³⁶ European travellers to India were often surprised to find that individual cases of homicide seldom received a death penalty from Indian rulers and chiefs,³⁷ unless their context was highway robbery or banditry which was seen as a challenge to sovereignty.³⁸ When a robbery did not take place with this degree of organized violence, the plaintiff and accused could come to an agreement about the restitution of stolen property, or compensation for it, and it was

³⁴ Cf. Cynthia Herrup, 'Crime law and society, a review article', for a useful reminder that a simple contrast between a past age of community law and a modern age of state law can lose explanatory value. *Comparative studies in society and history*, 27, 1 (January 1985), pp. 159-70. *Hakim*: person in authority, the ruler.

³⁵ Cf. *Seir*, II, p. 167, for the terms in which Gholam Husain praises a magistrate (here the kazi): 'his sole view was to cut the difference short, to the satisfaction of both parties; always contenting himself with his legal fees.'

³⁶ *Razinamah*: deed of agreement.

³⁷ Of the petty states of eighteenth-century Gujarat, Forbes noted: 'Capital punishments are seldom inflicted under these administrations; fines are more frequent and more acceptable to all parties; pardons can generally be purchased for the most atrocious crimes between man and man, where the prince and his rulers are not affected' J. Forbes, *Oriental memoirs*, vol. II, 1813, p. 25. RB to GG in C, 6 February 1788, BRC P/51/16, 1-29 February 1788, pp. 413-14, for Banaras; J. Low, Resident Lucknow, to Secy to Govt of India (GOI), 1 November 1838, J. Paton, Addnl Mss 41300, pp. 338-51, British Museum (BM).

³⁸ Highway robbery was often the signal for disaffection; it implied a danger to the flow of tribute, and a potential accumulation of wealth for rebellious independence.

understood that the signing of a *razinama* to that effect would secure a more lenient punishment from the *hakim*.³⁹

Whereas such cases were treated as matters of personal injury in the first instance, there were spheres related to moral regulation in which Mughal rulers very confidently assumed a hortatory stance and a punitive prerogative.⁴⁰ The *kazi* was understood to have a special responsibility in such matters — to abolish wine shops, gambling, and prostitution in the city.⁴¹ Aurangzeb instituted the *muhtasibs* as another layer of official agency to prosecute such offences. The *muhtasibs* were to prevent people from 'unlawful deeds especially drinking of wine, taking bhang, ale, other intoxicants, committing shameful deeds and adultery . . .'.⁴² Imperial justice and order in the towns was also supposed to sustain a fair market, protecting consumers from false weights and measures, and, in times of scarcity, preventing an artificial escalation of prices through hoarding.⁴³

In stating the ideal for determining forms of punishment, Akbar said they should vary according to the rank and status of the offender:

In short, punishment is the most important affair of sovereignty and hence it should be made with sedateness and understanding. . . .

³⁹ See chapter two.

⁴⁰ The *nazim*, the *faujdar*, the *kotwal* and even the *zamindar* who was given a *sanad* were all instructed to prevent the consumption of 'forbidden articles and substances'. *Document forms*, pp. 32, 36, 38, 43, 48.

⁴¹ For executive assistance in such matters, the *kazi* would usually have to apply to the *kotwal*. The taxation of such sinful activities was out of the question. The *via media* which probably prevailed was to 'fine' them regularly and prevent them from too conspicuous a presence.

⁴² *Mirat*, p. 222. The *muhtasib* was to enforce the Islamic code of morals, which included a ban on the purchase and sale of intoxicating drinks and drugs. He also had to prepare a daily schedule of rates in the market and standardize weights and measures within it. These functions overlapped with those of the *kazi* and the *kotwal*. M.Z. Siddiqi, 'The *muhtasib* under Aurangzeb', *Medieval India Quarterly*, p. 113. Cf. also J. Sarkar, *Mughal administration*, pp. 40, 45–6.

⁴³ Nawab Jafar Khan is praised in the *Riyazu-s-Salat* for not allowing rich people to hoard stocks of grain, and making sure that poor people were not charged more than the current prices of foodgrains. *Riyaz*, pp. 280–1. Cf. D.L. Curly, 'Fair grain markets and Mughal famine policy in later eighteenth century Bengal', *Calcutta historical journal*, 11 (1977), pp. 1–26, for the Mughal strategy of local autarky and regulation of grain prices in central marketplaces in bad times.

Further, punishment of every one should be befitting his condition . . . a severe glance at a man of lofty nature is equivalent to killing him, while a kick is of no avail to a man of low nature.⁴⁴

Personal dishonour was considered a powerful weapon, particularly effective at the upper levels of society.⁴⁵ But the ruler still upheld his support for rank and social status, because the corporal forms of pain were usually reserved for the lower orders. The ideal of rule once stated, other factors could come into play. The diverse forms in which a ruler could punish offenders for the same crime, is a characteristic narrative in the Mughal chronicles, one meant to illustrate a determined approach, not a capricious exercise of power.⁴⁶ In the Banaras residency records we have an exposition from the *pandits* and Islamic law officers of the Ghazipur *adalat* on the norms for determining the sentence. Consulted by the British resident on the appropriate punishment for forgery, they began by saying that punishment rested with the discretion of the judge, and should be 'agreeable to the rank of the criminal'. They then went on to introduce other factors: the local norms for punishing the offence; whether it was a season of scarcity or plenty; whether debased coinage and forgeries were

⁴⁴ 'A farman of high dignity' c. 1588, *Mirat*, p. 142. *Tazir*, discretionary punishment for the reform of the offender, could take the form of whipping, imprisonment, banishment, or *tashir*, public disgrace, as in being paraded on a donkey with a blackened face.

⁴⁵ Its deployment signified the emperor's exemplary displeasure, whether against contumacy or violations of public morality. A high official could be dismissed from the sight of the emperor, and a *zamindar* defaulting on revenue payment subjected to various religious and status indignities, in addition to incarceration. Rituals of public disgrace were often used to punish violations of market morality. Dealers and weighmen found guilty of hoarding stocks of grain and charging more than the current prices of foodgrains were paraded through the city on asses. *Riyazu-s-Salat*, pp. 280–1. On other occasions, however, men of rank would be fined but exempted from any ritual of public disgrace. Cf. Orme for a reference to the *kotwal* extracting money from 'Gentoos who have commerce with public women; Moors who are addicted to drinking spirituous liquor; all persons who hazard money in gaming' to exempt them from public disgrace. Selections from *Of the government and people of Indostan*, p. 36.

⁴⁶ As, for instance, when Ali Vardi Khan decided to chastise the *Banjaras*: 'some men were killed, others thrown into prison, many released'. J. Sarkar (trans.), *Bengal Nawabs*, Azad-al-Husaini Nau-bahar-i-Murshid Quli Khan, 1952, p. 17. *Banjaras*: armed bodies of grain and cattle dealers, who sometimes made raids on their own behalf or as mercenary auxiliaries.

very prevalent or whether people were unaccustomed to these.⁴⁷ The emperor Muhammad Shah, they recounted, to punish forgeries and debasement of coin, 'by advice of the Molavies confined some, flogged others, and cut off the hands of some and banished others.'⁴⁸

This reference to the 'advice of the Molavies' introduces the other ideal by which Persian chronicles praised the justice of a Mughal ruler or a provincial nazim, namely his deference to the norms of the sharia. For offences in which the Islamic law prescribed a fixed penalty, *kisas* or *hadd*, the justice of the ruler was measured by his insistence on following this to the letter, irrespective of the rank of the parties.⁴⁹ However, as the Company's officials were to discover, the range of offences for which a specific punishment was fixed in Islamic law was very limited. Moreover, these specific punishments were often barred by criteria of evidence or by legal exceptions. The punishment actually handed out often depended on the discretion of the kazi or of the executive officer on the spot.

While Mughal order rested to a great extent on military governorship and executive discretion, consultation with the sharia was of considerable symbolic importance to its legitimacy. Under Aurangzeb, however, there was a discernible effort to extend the prosecutorial prerogative of the state; especially to vest official agencies with greater punitive responsibility, and to explore Islamic jurisprudence to provide reference points for this enterprise.

⁴⁷ Evidently a principle of 'buyer beware' operated if forgery and debased coinage were very prevalent. Report of P. Treves, April 1789, and report from the Ghazipur adalat, 1 December 1788, in G.N. Saletore, *Banaras affairs (1788-1810)*, vol. 1, 1955, pp. 105-10.

⁴⁸ *Ibid.*, p. 107.

⁴⁹ *Hadd*: fixed penalties for acts forbidden in the Koran; *kisas*: retaliation for killing or wounding. The *Riyaz* praises Murshid Quli Khan, the nazim of Bengal, for executing his own son in obedience to the sharia, to avenge the wrong done to another, thereby obtaining the title *Adalat Gostar*, strewer of justice. *Riyazu-s-Salat*, pp. 258, 282. It cites another incident in which the nazim, despite the intercession of a faujdar, had a kotwal stoned to death for enticing away the daughter of a Mughal. *Ibid.*, p. 284. The offence was evidently tried by the Islamic law relating to *zina*, prohibited sexual intercourse. One of Aurangzeb's chroniclers praises him for never having ordered an execution without reference to the sharia. But this evidently includes those cases in which the maulvis allowed capital sentence *siyasatan*, that is, at the ruler's discretion, 'for the general good'.

Aurangzeb's Farman of Justice

In contrast to Akbar's attempt to emphasize the mystical and all encompassing nature of the emperor's communion with God, Aurangzeb's political strategy, particularly after 1666, favoured a more clear-cut association with Muslim orthodox opinion, and an effort to stress the special status of Muslims under the Mughal imperium.⁵⁰ The importance he gave to the kazi in the administration was remarked on by contemporaries, not always with approval.⁵¹ Aurangzeb's appointment of muhtasibs in 1659 could be characterized as an earlier gesture towards Islamic orthodoxy.⁵² However M.Z. Siddiqi also suggests that the muhtasib came to extend his functions in the domain of market regulation.⁵³ Could one attribute this to the growing difficulty of maintaining Mughal control over markets and their revenues? In 1670 Aurangzeb ordered a compilation of extracts from authoritative works of the Hanafi school of jurisprudence. A syndicate of scholars was summoned to go through all the books on jurisprudence in the imperial library and the result was the *Fatawa-al-Alamgiriyya*, which according to Aurangzeb's admiring chronicler, rendered the world independent of all other works of jurisprudence.⁵⁴ The author of the *Maasir-I-Alamgir* (completed in 1710) attributes Aurangzeb's decision to his desire to make the general Muslim public act according to the legal decisions and precedents of the *ulama* of the Hanafi school.⁵⁵ But here again it seems reasonable to speculate

⁵⁰ Cf. M. Athar Ali, *The Mughal nobility under Aurangzeb*, 1970, pp. 98-9.

⁵¹ Khafi Khan remarked that Aurangzeb had established the kazi so firmly in the affairs of the state that leading officers felt envious. Anees Jahan Syed (ed.), *Aurangzeb in Muntakhab al Lubab (Khafi Khan)*, 1977, p. 248. Cf. also *Riyazu-s-Salat*, p. 284. The *wazir* complained that 'experienced and able officers of the state are deprived of all trust and confidence while full reliance is placed on hypocritical mystics and emptyheaded scholars.' c. 1676, cited in *The Mughal nobility under Aurangzeb*, p. 99. Gholam Husain who favoured a more universalistic attitude for the ruler said the power given to such men was exercised with so much avarice that it brought 'ruin to the posterity of the faithful'. *Seir*, II, pp. 180, 160.

⁵² M.Z. Siddiqi, 'The muhtasib under Aurangzeb', pp. 113-19. J. Sarkar, *Mughal administration*, pp. 40, 45-6.

⁵³ 'The muhtasib under Aurangzeb', p. 117.

⁵⁴ Saqi Must'ad Khan, *Maasir-I-Alamgiri*, trans., Jadu Nath Sarkar, 1947, p. 316. *Encyclopaedia of Islam*, III, 1971.

⁵⁵ *Maasir-I-Alamgiri*, pp. 314-15. *Ulama*: those learned in Islamic law and religion.

that a wider administrative rationale may have begun to frame this measure. Significantly, the funds for this project were derived by discontinuing the charges incurred for recording the annals of the reign. Was Aurangzeb suggesting that this jurisprudential compilation would have a greater significance for the empire than the personal chronicles of an emperor?⁵⁶

The compilation was translated from Arabic into Persian to make it more accessible, and came to form an authoritative source for guidance on interpreting Islamic law.⁵⁷ A very important farman issued by Aurangzeb in 1672, again indicates that the emperor was trying to extend the prosecutorial initiative of the state.⁵⁸ There were obvious advantages to having a body of case law to regularize this endeavour. Aurangzeb's farman stresses the importance of regularity in the disposal of cases.⁵⁹ It is also distinctive for the specificity with which offences are described, for its emphasis on extending the punitive responsibility of the state, and for using a judicial point of reference in doing so. The order did not insist that the kazi and mufti alone were to determine the punishment of every offender, but that 'what the Nazim of the Subah decides should be

⁵⁶ The terms in which the chief kazi of the Company's Nizamat Adalat interpreted Aurangzeb's decision for J.H. Harington, the chief judge, are suggestive: 'Credible persons have related . . . it occurred to the King that there were many books of history in the world, and that from the inclination which mankind have to read such books they are composed without order from kings and nobles; that the foundation of good government is justice . . . Since the examples of law were dispersed, he went on, and cases of lesser weight not distinguished from the authoritative ones, some decisions repeated and others omitted, so Aurangzeb concluded that a new compilation of authoritative decisions was necessary. J.H. Harington, *Elementary analysis*, vol. 1, pp. 240-1.

⁵⁷ Aurangzeb's reign saw a flourishing of schools for teaching Islamic jurisprudence. The chief kazi of the Company's Nizamat Adalat said that Aurangzeb was able to call upon legal expertise from Punjab, Shajahanabad, Akbarabad Allahabad, and the Deccan to compile the *Fatawa-al-Alamgiriyya*, *Elementary aspects*, 1, p. 241. Cf. Abdul Halim Sharar, *Lucknow: The last phase of an oriental culture* (trans. and eds) E.S. Harcourt and Fakhir Hussain, 1975, p. 38, for the fame of the Firangi Mahal curriculum at Lucknow.

⁵⁸ *Mirat*, p. 248. This drive reveals another dimension to the importance which Aurangzeb tried to give to the kazis. In a letter of 1696 to his son Mohammad A'azam, he wrote, 'There is no more important work than "kaziship", because the people of God (whose dignity is great) are imprisoned or sentenced to death by the decision of a kazi.' *Ruka'at-i-Alamgiri*, p. 42.

⁵⁹ People were not to be kept in confinement for long periods without investigating their cases. *Mirat*, pp. 248, 253.

done in accord with the judges.⁶⁰ Secondly, the farman encouraged the administration to assume powers of discretionary punishment where the evidence did not fulfil the legal requirements for one of the fixed penalties of hadd or kisas.⁶¹

This can be illustrated by the cases of theft and of homicide. In the case of theft, the value of the property stolen had to be above a certain amount to qualify it for the hadd penalty. Aurangzeb's farman stated that where the sum stolen was less than this prescribed amount, the thief was to be flogged and imprisoned 'till he repented'.⁶² The farman orders that for repeated offences the thief could be permanently imprisoned or even put to death.⁶³ For the offence of strangling the offender was to be flogged and kept in prison till he repented, and

If a person drowns another person in water or throws him into a well or pushes him down from a terrace and he dies. There is a legal proof for the same; the man should be flogged and imprisoned. He should be made to give blood money as sanctioned by religion.⁶⁴

Such cases of homicide are those in which no weapon is used to kill the victim. According to the Hanafi school of jurisprudence favoured in Mughal India, capital punishment could be awarded only if the homicide involved a weapon usually associated with the shedding of blood, and whether a particular weapon met this requirement was the subject of much legal debate. By the Hanafi interpretation, homicide by drowning or strangling did not establish a liability to kisas, retaliation, and the heirs of the deceased were only entitled to diya, the fine of blood.⁶⁵ Aurangzeb's farman

⁶⁰ *Mirat*, p. 248.

⁶¹ Aurangzeb did not outline any specific punishment for cases where hadd or kisas could not be awarded. His farman was more in the nature of a directive that the administration should assume a responsibility for awarding punishment in such cases, and consult the kazi and the mufti in doing so. *Ibid*.

⁶² According to the *Hidaya* of al-Marghinani (died 1196), a twelfth century Arabic legal text, held in high esteem by Hanafi jurists of the Mughal period, a theft was defined as the taking of goods to the value of ten dirhams or more when in safe keeping. Lt. Col. Vans Kennedy, 'An Abstract of Muhammedan Law', *Journal of the Royal Asiatic Society (JRAS)*, 2 (1835), pp. 81-162. Henceforth, 'Abstract of Muhammedan law'.

⁶³ *Mirat*, p. 248. Cf. also order No. xxxii, in S.M.A. Husain (ed.), *Kalimat-i-Tariyat*, 1982, p. 37.

⁶⁴ *Mirat*, p. 248.

⁶⁵ 'Abstract of Muhammedan law', pp. 142-4.

indicates that in addition to the fine paid to the heirs, imperial officers should also exact some punishment, though it does not suggest capital punishment. The farman also orders the punishment of anyone who strangled people for their property, not only if his guilt was proved by sharia law, but also if he was 'notorious among the people for this misdeed', or 'if the Nazim of the Subah and the judges believed that the misdeed was committed by him'.⁶⁶

The Ottoman emperors made far more elaborate provision for *kanun* relating to criminal justice than the Mughal emperors. However, it has been remarked that Aurangzeb's farman of 1672, though limited in scope, was the only parallel to the Ottoman *kanun* in the Muslim world.⁶⁷ In one sense Aurangzeb's effort to extend the judicial and punitive territory of the state would be taken up again in the Anglo-Muhammedan law as it evolved in the Company's criminal courts. Harington, judge and orientalist, based his influential sketch of Islamic criminal law chiefly on the *Hidaya* and the *Fatawa-al-Alamgiriyya*, the former for rules and principles, the latter to supplement illustrations through cases.⁶⁸

Law and Justice under the Regional States: Breakdown and Judicial Venality?

By the eighteenth century the Mughal state was unable to maintain a balance between its own agencies on the one hand and local rural and urban notables on the other.⁶⁹ The economic resilience of

⁶⁶ *Mirat*, Preface of Justice, p. 249.

⁶⁷ Uriel Heyd, *Studies in old Ottoman criminal law*, 1973, p. 2. The Ottomans issued these *kanuns* both to allow non-sharia judges to exercise powers of punishment, and to keep local officials and fief holders in check. *Ibid.*, pp. 2-3. *Kanun*: law.

⁶⁸ *Elementary analysis*, vol. 1, p. 241. The *Hidaya*, was brought to Hastings attention when he wanted a standard work for guidance in criminal justice. He had it translated from Arabic into Persian, thereby making it accessible to the Islamic law officers of the faujdari courts.

⁶⁹ Some scholars have attributed this decline to the very dynamic of growth under the Mughal empire, which allowed regional contenders, both from the ranks of Mughal officials or from the ranks of local zamindars, to accumulate armies and resources. M. Alam, *The crisis of empire in Mughal North India*, 1986, p. 6; *Rulers, townsmen and bazaars*, pp. 11-12, 36-7, 72, 162-3, 267; and *Land and sovereignty in India*, pp. 32-4 for a similar argument. However R.P. Rana argues that zamindars prospered by appropriating Mughal revenues, not through an expansion in production. 'A dominant class in upheaval', *IESHR*, xxv, 4 (October-December 1987), pp. 395-410.

certain areas allowed some regional magnates to increase their own resources while still meeting the imperial demand. Elsewhere this contest threw productive tracts out of cultivation, and changes in bullion flows disrupted trade.⁷⁰ As the faujdari network on the highways weakened,⁷¹ local zamindars and Mughal satraps positioned themselves as the dispensers of 'justice and protection', levying fees and fines in this capacity.⁷² The uncertainty of resources from the centre may have impelled Mughal-appointed kazis and muftis to enhance their fees.⁷³ The other explanation for the escalation in fee-taking and farming of offices is that state-building in the seventeenth and eighteenth centuries demanded a steadier cash flow to sustain the employment of mercenary armies.⁷⁴

The decay of Mughal agencies did not necessarily mean that no alternative arrangements for the dispensation of justice and the

⁷⁰ Cf. *Historical fragments*, pp. 266-7.

⁷¹ Around 1719 it was reported that many of the faujdars on the royal highway from Delhi to Patna had abandoned their posts or were without contingents. Saiyid Abdullah Khan Qutb-ul-Mulk to Rajah Chhabela Ram, Subehdar of Allahabad, c. August 1719, in Satish Chandra (ed.), *Balmukund Nama*, 1975, p. 27.

⁷² Zamindars began to establish rival markets under their own protection and to levy fees and fines for arbitrating in disputes. For Bengal, see P.B. Calkins, 'The formation of a regionally oriented ruling group in Bengal, 1700-40', *Journal of Asian Studies (JAS)*, 4 (August 1970), pp. 799-806; W. Firminger, *Introduction to fifth report*, pp. xxvi-xxviii; A. Chatterji, *Bengal in the reign of Aurangzib, 1658-1707*, 1967, pp. 255-6. Aurangzeb had tried to check officials from augmenting their local resources with fees and fines. Around 1661, he ordered that royal officials were not to levy charges for restoring a slave or a concubine to their owner, or for recovering a loan, *Mirat*, pp. 223, 256-7. In a farman of 1678 to the Diwan of Gujarat he pointed out that 'punishment with wealth' was not allowed by the sharia, *Mirat*, p. 261. The traditional Islamic law knew no fines except for diya, the fine of blood.

⁷³ The kazi, the kotwal and the muhtasib had probably always taken some local fees for their various functions: the kotwal from heads of trades and professions and shopkeepers; the kazi for performing marriages, arbitrating between parties, putting his seal upon a document; the muhtasib for putting his seal upon weights and measures to certify their correctness. Referring to the muhtasib's fees, Gholam Husain said these were meant to be token in nature. *Seir*, III, 1975, p. 172. The compiler of the *Mirat* complained of illegal exactions since the early eighteenth century. The tax collector of the nazim interfered in fixing the prices of articles, and royal officers existed in name alone. *Mirat*, p. 343.

⁷⁴ Subrahmaniam and Bayly, 'Portfolio capitalists and the political economy of early modern India', *IESHR*, xxv, 4 (October-December 1988), p. 423.

maintenance of order took shape. But the tussle for power could mean an intervening period of 'banditry' and insecurity.⁷⁵ It could also bring a decline in official patronage for families which had flourished in the service of the Mughal empire. For many of the Muslim literati and service gentry of small towns who depended upon Mughal order for the security of their land rights, the new-found presumption of the zamindars was highly offensive.⁷⁶ In addition, the idea that the kazi could withhold the performance of religious offices for non-payment of fees and that the farming system allowed entry to all kinds of 'new men', could also be interpreted as a symptom of disturbing times.⁷⁷ The author of the *Riyaz* recalled that in the reigns of Aurangzeb and in the Nizamat of Jafar Khan, only the nobility, the scholars, the learned and the excellent, who passed the examinations were appointed to the post of kazi. The office was never bestowed on 'the low and the illiterate'.⁷⁸ Such complaints found an echo in the Company's contention that the farmers of revenue and the zamindars had usurped the administration of justice from Mughal offices.

Where the regional ruler was himself a Muslim, who controlled cities with large Muslim populations, and depended on bodies of Muslim warriors, the offices of the kazi and mufti continued to receive endowments.⁷⁹ However, even under the Nawabs of Bengal

⁷⁵ As outlined for early eighteenth-century Golconda in J.F. Richards and V.N. Rao, 'Banditry in Mughal India', *IESHR*, xvii, 1 (January-March 1980), pp. 95-100.

⁷⁶ *Seir*, 1783 edition, II, p. 571. Cf., *Rulers, townsmen and bazaars*, for a discussion of this theme. *Jagirs*: assignment of land revenue.

⁷⁷ Gholam Husain expressed his outrage at the pressure put on the poor for the payment of fees at a death, circumcision or marriage. *Seir*, III, pp. 160, 166. In addition, aspects of the syncretic culture of the Muslim regional courts may have shocked the more orthodox among the Muslim elites. Regional rulers drew their administration into closer association with regional traditions of law or judicial arbitration, as for instance when a Shia mufti was appointed to the court of Awadh in 1847. J.R.I. Cole, *Roots of North Indian Shi'ism in Iran and Iraq*, 1988, pp. 209-13.

⁷⁸ *Riyazu-s-Salatin*, p. 284.

⁷⁹ J. Malcolm noted that the offices of the kazi and the mufti were still upheld in Bhopal, though they had declined in the Maratha states. *A memoir of central India*, 1823, pp. 543-4. In regimes where this point of connection with the Mughal past was not so important, the income and endowments of the kazis and muftis declined. Of the kazis in the Banaras Zamindari, Duncan remarked that they were in a forlorn condition, with no settled allowances, RB to GG in C, 12 September 1788, BRC P/51/25, 6 August 1788, p. 215.

and Awadh, kazis and muftis could lose their authority in urban administration to revenue farmers and other 'new men' favoured by the regime.⁸⁰ Under all the successor states, however, kazis and muftis retained their significance as local notables who could speak on behalf of the resident Muslim community, and as members of the respectable landholding section of society.⁸¹ Even those chroniclers who lament the erosion of the kazi's standing and the decline in piety and learning of those appointed, did not disapprove of the tendency of the office or its endowments to become hereditary.⁸² Local influence began to play an increased role in the determination of appointments.⁸³ The signatures of the mufti and of the kazi continued to appear with those of other worthies of the locality in reporting an occurrence or verifying a statement of right or custom for the consideration of higher authority.⁸⁴ The authority of the kazi's seal still carried weight in

Cf. also W. Firminger, *Introduction to fifth report*, p. xliii; and *Rulers, townsmen and bazaars*.

⁸⁰ Cf. *Tafzibu'l Ghafilin*, trans. W. Hoey, 1885, 1974, pp. 55-6, for the author's charges that the Nawab's servants and favourites had eclipsed the adalats and that the kazi and mufti therefore elected to stay at home.

⁸¹ V.T. Gune, *The judicial system of the Marathas*, 1953, p. 24. J. Malcolm, *Memoir*, I, 1832, p. 543. In Banaras Jonathan Duncan reported that the kazi and mufti of Banaras were still honoured with a *khat* at the *Id* festival, paid from the customs receipts. RB to GG in C, 2 October 1789, BRC P/51/49, 21 October 1789, p. 173. *Khat*: robe of honour.

⁸² *Riyazu-s-Salatin*, p. 284. The Muslim literati, who filled the ranks of kazi, mufti and muhtasib, had been turning their endowments into hereditary zamindaris and extending their local influence around certain *qasbas*. Cf. *Rulers, townsmen and bazaars*. Also *Calendar of Oriental Records*, 1955, vol. I, no. 23, p. 19 for a sketch of one Abdur Razzaq, appointed kazi and muhtasib in Aurangzeb's reign, who entrenched himself in landholding and *qasba* influence. *Calendar of Persian Correspondence (CPC)*, vol. VII, 1785-7, p. 334 for a letter from the widow of kazi Wafayar Khan claiming that the *qazat* of Murshidabad had been hereditary in her family since the reign of Aurangzeb. *Qasba*: small town; *qazat*: post of kazi.

⁸³ M. Alam, *The crisis of empire*, p. 117 and n. V.T. Gune states that the kazi lost his place in the *diwan*, the pargana-level body of the ruler's officers in the Maratha administration, but found a place in the *gota*, the consultative body of landholders and holders of *watans*, hereditary offices. He continued to serve the judicial and religious needs of the Muslim community and received endowments from the government for this. *The judicial system of the Marathas*, p. 24.

⁸⁴ In an investigation into the homicide of a *fakir*, in Sindhia's domain, the *panchayat* consisted of a kazi on behalf of the Muslims, a chaudhury on behalf

the attestation of documents, such as deeds of sale and transfer of property.

My conjecture is that the position of the kazi, mufti and muhtasib in the administrative hierarchy was more vulnerable to these changes than that of the kotwal. The imperial kotwal could be replaced by an appointee of the regional ruler, or the local farmer of revenue, but the executive functions of the office remained necessary and he could appropriate many of the functions of market-regulation which used to be overseen by the kazi and the muhtasib. In addition, the kotwal had always had to negotiate with the *rais*, the merchants, and the heads of various trades for good order in the city.⁸⁵ In other words, the farming of office did not necessarily mean that the kotwal could collect fees with no accountability for his actions. The real slump in the status of his office may have come with the introduction of the British judge-magistrate.

There is still the question of whether the decline of centralized agency imposing fiscal and judicial checks meant an instability at the core of the regional states? Could regional rulers keep revenue farmers who were assembling military, fiscal and judicial offices in check? The picture is rather blurred. Some historians have argued that the ability of regional rulers to exercise a closer control over resources made it less necessary for them to sustain that elaborate network of overlapping agencies which characterized Mughal imperium. Certain regional states succeeded in building up their own bureaucracies;⁸⁶ but in others the handing over of bundles of rights,

of the tradesmen, and two chaudhuries on the part of the zamindars. J. Malcolm, *Memoir*, I, pp. 555–6. Cf. chapter two for instances from the Banaras Zamindari. *Fakir*: religious mendicant; *panchayat*: arbitral assembly.

⁸⁵ *Rulers, townsmen and bazaars*. Men of influence maintained their own watchmen for their gated neighbourhoods. Cf. 'Translation of a report on the manner in which the night watch of the police is conducted in the city of Banaras' in *Selections from the Duncan Records*, Appendix I, pp. ciii–civ. The chaudhuries of the trades and professions had to give undertakings to the kotwal for the good behaviour of their 'constituency', but they were given considerable discretion in ensuring this. J. Malcolm, *Memoir*, I, pp. 555–7. Cf. also Buchanan-Hamilton in M. Martin (ed.), *Eastern India* (Bhagalpur), 1838, p. 282. *Rais*: influential residents.

⁸⁶ Stewart Gordon suggests that by 1740–50 a marked differentiation had taken place in the Peshwa's bureaucracy and the Peshwa's faujdars and kotwals were producing cases on every aspect. 'The slow conquest', *MAS*, 11, 1 (1977), p. 27. However the Maratha administration still had to proceed by negotiation

both fiscal and military-executive, to farmers of revenue meant that the institutional core of the ruler's authority was rather fragile.⁸⁷

The Critique of Pre-colonial Rule

The transition to Company rule in Bengal has been dealt with in formidable depth.⁸⁸ Nevertheless the Company's critique of the existing forms of judicial and punitive authority is worth looking at for the different notions of rule which were being expounded. This critique was to have a great influence on nineteenth-century administrative histories of the Company, particularly those which highlighted its reforming impetus against its critics in Britain.⁸⁹ This critique also influenced more contemporary legal histories of India, which characterize the Company's judicial measures as the first steps in a liberal progression towards reason, humanity and natural justice.⁹⁰

with the larger zamindars rather than by punitive measures. *Ibid.*, p. 28. Gune also suggests that from the 1730s or so the Peshwa's government was using its administrative personnel to bring hereditary village officials under tighter control. *The judicial system of the Marathas*, p. 126. Cf. also F. Perlin, 'State formation reconsidered', pp. 453, 455.

⁸⁷ Cf. Philip Calkins, 'The formation of a regionally oriented ruling group'. Subrahmanyam and Bayly suggest that the volatile combination of farming rights in external trade, agrarian surplus and contracts for military service made indigenous regimes vulnerable to British private traders who could tap the same networks. 'Portfolio Capitalists', pp. 422–3. However rulers may have tried to curb this volatility by sustaining personal ties of allegiance as well. This would qualify current assumptions about the openness of the eighteenth century market for the 'perquisites of kingship' and reveal the persistence of a cultural ethos of *sifarish*, patronage, ramified by kinship and personal loyalty. Raja Chait Singh of Banaras resisted Hastings' demand that he reduce his personal military establishment and raise a body of horsemen disciplined in the European fashion. He realised that the latter could be taken over more easily by the Company than a force sustained by a complex network of alliances and retainership. Cf. S.N. Sanyal, *Banaras and the East India Company*, 1979, p. 58; and Francis Fowke to Council, 7 March 1776, Fowke papers, 32 Mss Eur, G.3, p. 22.

⁸⁸ I have relied heavily, among others, on A.M. Khan, *The transition in Bengal 1756–75*, 1969; N. Majumdar, *Justice and police in Bengal 1765–93*, 1960; W.K. Firminger (ed.), and with introduction, *The fifth report*, 1917; D.N. Bannerji, *Early administrative system of the East India Company in Bengal*, vol. 1, 1765–74, 1943.

⁸⁹ J.W. Kaye, *The administration of the East India Company*, 1853.

⁹⁰ B.B. Misra argues that the changes introduced by the British sprang

Venality was the most prominent charge in the Company's critique of judicial arrangements, indicating its concern to seal off fiscal leakages attributed to 'unauthorized' fees and fines.⁹¹ In the climate of the times, the charge also had overtones of anxiety about the way in which the Company's own employees were siphoning off revenues by levying fees and fines for settling disputes and recovering debts.⁹² The argument was that judicial authority in the hands of those who lived off the profits of revenue collection would inevitably be converted to private gain. The scale of punishment would be calibrated to the profit motive and not to the public interest.⁹³ Heinous crimes such as murder, Company officials complained, were compromised by the 'purchase' of a pardon; on the

from principles of 'natural justice and equal citizenship'. *The central administration of the East India Company*, 1959, pp. 298, 339. 'British rule brought equality before the law', writes T.K. Banerjee in his very substantial legal history, 'the poorest peasant was entitled to all the solemn formalities of a judicial trial and the provisions for punishment made no difference between the highest functionary . . . and a sweeper.' *Background to Indian criminal law*, 1970, p. 290. 'The system of Muslim criminal justice', declared N.K. Sinha, 'does not certainly deserve to be extolled. When it was swept away the British were in a position to make their most valuable contribution to Indian administration — their system of criminal justice.' Preface to N. Majumdar, *Justice and police in Bengal*.

⁹¹ 'I have made the revenue my principle object', wrote Hastings to Josias Dupre in connection with the regulations of 1772, 6 January 1773, in Gleig, *Memoirs*, I, p. 273. Shortfalls in collection were blamed on the 'arbitrary fees and fines' exacted by the zamindars, the nawab's revenue agents and the faujdari officers. The revenues also had to be protected against bandit raiding, which often assumed the dimensions of a competing claim over the revenue, and against the contributions levied by armed bands of mendicants, the *sannyasis* and the fakirs. A. Dow, *The history of Hindostan*, transl. from the Persian, new edition, vol. I, 1803, p. xxxii, for the latter. Peasants would withhold their payments, pleading losses from fakir incursions. A.M. Davies, *Life and times of Warren Hastings*, 1935, reprint, 1988, p. 104.

⁹² The regulations of 1772 tried to curb this in Bengal, but in the Banaras Zamindari and in Awadh, Company officials continued to dabble in revenue farming and to contract their authority for the recovery of debts. W. Bolts, *Considerations on India affairs*, 1772, p. 310. CPC, vol. VI, 1781–85, p. 21, for the activities of the commanders of British battalions in Awadh.

⁹³ 'A short view of the administration of Justice by the Country Government, collected from the proceedings of the Council of Control established in September 1770 at Moorshedabad', Orme Mss, India, vol. XVII, p. 4764; Sixth report of the Committee of Secrecy, 1773, in *Introduction to the fifth report*, p. xliii; J. Forbes, *Oriental Memoirs*, II, p. 25; GG's minute, 3 December 1790, BRC P/52/22, pp. 191–2; J. Malcolm, *Memoir*, I, pp. 537, 554.

other hand large fines could be levied for fornication and witchcraft, with the amount scaled to the resources of the offender.⁹⁴

Here it is worth turning once again to Gholam Husain for the Company's charge that venality was the dominant motif in the judicial arrangements of eighteenth century Indian states. Englishmen, he complained, learnt of the institutions of the country from men who, to please their masters, never failed to show

a deal of revenue matter in every institution and custom; and they are so firm in that opinion, that one would be inclined to believe, that the setting up of this and that institution, was for no other view but that of scraping together a few pence . . .⁹⁵

Husain admitted that certain institutions of the Mughal past had been perverted entirely to fee-taking. But what he objected to was the obliteration of any rationale of public welfare from their history.⁹⁶ On fines for fornication for instance, he explained that the Muslim sovereigns of India disapproved of 'public women', and of fornication, and of Muslims who kept slave girls and concubines without converting them to Islam, so they punished people for such offences.⁹⁷ Evidence from the regional successor states also makes it clear that complaints regarding witchcraft, adultery, and the enticing away of wives, were matters in which the hakim was supposed to associate his authority with the ideal of the general good.⁹⁸

The contracting out of judicial office did make it difficult to idealize the dispensation of justice as an aspect of public welfare removed from fiscal considerations. When the Sikh chief Nihal Singh told one Sukh Dial to administer justice with mercy and religious honesty, the latter, who had bid thirteen lakhs for this office, folded his hands and 'said justice by contract' made this difficult.⁹⁹ Even so one can make some distinction between a

⁹⁴ Ibid.; also N. Majumdar, *Justice and police in Bengal*, p. 74.

⁹⁵ *Seir*, II, p. 555.

⁹⁶ By his interpretation, the public good hinged on issues such as sexual morality, public decorum in the marketplace, and a check on conspicuous display by those of lowly rank who should not aspire to magnificence. *Seir*, II, pp. 555–6, 565–6.

⁹⁷ *Seir*, III, p. 556.

⁹⁸ J. Malcolm, *Memoir*, II, pp. 53–4; R. Orme, *Selections from Of the government and people of Indostan*, p. 36; *Seir*, III, pp. 556, 565–6.

⁹⁹ However it is also significant that the chief deferred payment for one year to allow him to operate without this pressure. Newsletter of 18 September

recognized judicial principle and that which was regarded as bribery and corruption. The scaling of a fine to the income of the offender, as in cases of witchcraft or fornication, had its own rationale of equity. Levying the fourth part of a debt or disputed property as the cost of approaching the hakim was accepted procedure. This might not of itself prejudice the case, though it probably encouraged a preference for cheaper agencies of arbitration. Orme declared that the value of the bribe determined the justice of the cause, but went on to say: 'This is so avowed a practice, that if a stranger should enquire, how much it would cost him to recover a just debt from a creditor who evaded a punishment, he would everywhere receive the same answer — the government will keep one-fourth, and give you the rest.'¹⁰⁰

On the compromising of heinous crimes with payment, one has to make a distinction between fines appropriated by the ruler and the fine of blood payable to the heirs of the deceased in restitution for homicide. The latter was accepted practice, as the British were to discover, not only by Islamic law but by the general norms with which people sought justice for an offence 'of blood'.¹⁰¹

The issue of judicial venality also hinged on certain conceptual distinctions as to legitimate and illegitimate sources of tribute. British officials alleged that Indian rulers and zamindars merely mulcted bandit gangs and released them if their own revenues were

1813, in H.L.O. Garret and G.L. Chopra (eds), *Events at the court of Ranjit Singh, 1810-17*, 1935, reprint, 1970, p. 95.

¹⁰⁰ Selections from *Of the government and people of Indostan*, p. 31. Richard Jenkins, the resident at Nagpur said that if public servants discovered the robbers, then one-fourth of the property recovered was taken by government, but if discovered by the efforts of the person robbed, he kept the whole. *Report on Nagpore*, 1827, p. 208.

¹⁰¹ *Oriental Memoirs*, II, p. 25. 'It is agreeable to the Law (i.e. the sharia) and a Maxim likewise among the Hindoos, that, in cases of Murder, if the perpetrators can find, means to satisfy the next heir of the Murdered man and obtain from him what is called a Razeenamah, no prosecution can, or ought to be carried on against him.' Magt Bakarganj, 5 January 1790, in reply to Cornwallis' questionnaire, BRC P/52/22, 3 December 1790, pp. 312-13. In some cases the patron of the deceased, or some corporate body to which he belonged, also had to be given 'satisfaction'. When a trader was murdered, Sardar Nihal Singh handed over the offenders' property to the traders of Amritsar, and also re-assured the victim's family that they would receive justice and compensation. 11 and 22 December 1810, *Events at the court of Ranjit Singh*, pp. 10, 14.

not affected, and that they even sheltered them for a share of plunder. Certainly, Balwant Singh, the zamindar of Banaras, Shuja-ud-daulah, the ruler of Awadh, and the revenue farmers becoming powerful in his territory, all recruited bands of hunters such as the Badhaks or armed camps of cattle-dealers such as the Banjaras, as an inexpensive way of supplementing their forces and claimed a share of their booty as tribute.¹⁰² On other occasions, however, they would chastise them by raids and mulcts if they made expeditions on their own account, or if they supported some recalcitrant chief.¹⁰³ British officials criticized this flexible approach, saying it encouraged such bands to persist in predation, and that the state was violating its obligation to protect property right. In his 1786 report on the Banaras raj, Beaufoy said the subject's right to protection of life and property had been insecure under Balwant Singh because his government 'exerted its power in regulating rather than punishing the Robbers that infested the Domains and the Rajah himself was supposed to have kept a numerous Banditti in his pay'.¹⁰⁴ State-building in the Company's terms rested on much more regular and concentrated fiscal exactions, for instance, on the systematic levies of the subsidiary system instead of on these more sporadic expeditions.¹⁰⁵ The latter could too easily be turned against the ruler himself to resist tributary demands.

¹⁰² Balwant Singh also used such bands to harass those rulers whose presence in the Zamindari was unwelcome to him. *The Bukharnamah*, pp. 47, 51, 53. Subsequently however he drove the Badhaks out of his kingdom. Cf. A. Seton to H. Wellesley, 17 January 1803 complaining that the Gujjars and Mewatis of Northern Moradabad bribed the amils by a fourth part of plundered property and the Nawab Vizier was indifferent so long as his own revenues were unaffected. A. Seton, to H. Wellesely, 17 January 1801. Private letters from A. Seton, H. Wellesley correspondence, Mss Eur F.178, p. 483; also R. Jenkins, *Report on Nagpore*, p. 270. 'There appears to be an established system of revenue derived from robbers which is connived in by all the Durbars throughout Hindustan', complained the Commissioner for the Sunderbans, Answers to Cornwallis' queries, 1789-90, BRC P/52/22, 3 December 1790.

¹⁰³ For instance when Alivardi Khan ordered a punitive raid on the Banjaras, the faujdar of Ghazipur tried to protect them saying that they were traders of the neighbouring kingdom of Awadh. J. Sarkar, *Bengal Nawabs*, p. 16.

¹⁰⁴ Home Misc 379.

¹⁰⁵ Related to this was the Company's reliance on full-time standing brigades instead of on the more flexible recruitment of such 'predatory' foot auxiliaries. Raiding contingents of foresters and hunters may have also begun to lose their importance for larger battle situations by the end of the eighteenth century. However they continued to be important in local contests over

Reclaiming the Prerogatives of Sovereignty: The Reforms of 1772

The *faujdari adalats* established in each district by the regulations of 1772 were supposed to gather up the judicial powers 'usurped' by the zamindars and revenue farmers.¹⁰⁶ The centralization of judicial prerogative was also extended by prohibiting creditors from confining their debtors. Article 20 noted that it had been

too much the practice for individuals to exercise a judicial authority over their debtors, a practice, which is not only in itself unlawful and oppressive, seeing a man thereby becomes a judge in his own cause, but which is also a direct infringement of the prerogative and powers of the regular Government.¹⁰⁷

Items of revenue which suggested a link between judicial functions and fiscal claims were abolished. The regulations prohibited commissions on money recovered, fees on the decision of causes, and all 'heavy and arbitrary fines'.¹⁰⁸ So even as the Company

revenue tribute, and in zones bordering difficult hill and forest terrain, such as in the *terai* regions of Bihar, Awadh and the North Western Provinces. Cf. RB to GG in C, 22 May 1791, BRJ P/127/74, 15 July 1791, pp. 601-3.

¹⁰⁶ Article 11 prohibited revenue farmers from inflicting punishments or levying fines, but they could decide property cases upto the value of ten rupees. General regulations for the administration of justice, 21 August 1772, in Colebrooke, *Supplement. Faujdari adalats: criminal courts*.

¹⁰⁷ *Supplement*, p. 4. 'The usurped power of the officers of the collections, and of the creditors over the persons of their debtors, is abolished.' Committee of Circuit to the Council of Fort William, 15 August 1772, in *Supplement*, p. 8. Yet it was acceptable procedure, both in Islamic law and in common practice, for a powerful creditor to confine his debtor to make him pay. Ali Ibrahim Khan, the judge of the Banaras adalat, stated that Islamic law permitted the creditor to confine his debtor, provided he was fed and not maltreated. RB to GG in C, 10 June 1789, BRC P/51/39, 1 July 1789, p. 665. Cf. also Buchanan-Hamilton, in M. Martin (ed.), *The history, antiquities, topography and statistics of Eastern India*, II, 1838, 1976, p. 572, reporting that creditors were dissatisfied with this innovation because they considered it an encroachment on their prerogatives.

¹⁰⁸ Article 16. Article 31 forbade the forfeiture of property of those sentenced to capital punishment, without a reference to the Nizam Adalat. The revenues derived from the *faujdari bazi jumma* (fines for offences such as fornication, adultery and abortion) were given up, Article 32. The Company also gave up revenue from the fees taken by kazis and muftis for the attestation of documents and performance of ceremonies, giving them a fixed monthly salary instead, Article 33, *Supplement*, pp. 4-5.

investigated every other possibility of tapping the fiscal resources of the province, it virtuously disclaimed any intention of 'making justice a source of profit'.¹⁰⁹ It was not as if the Company did not levy its own charges for the institution of a suit, particularly in the civil courts.¹¹⁰ But it did assume some special fiscal responsibilities in the sphere of criminal justice, one mark of which was the institutional expense of the colonial *jailkhana*.¹¹¹

Rule of Law and Judicial Discretion

One of the characteristic denunciations which Company officials levelled against Indian rulers was that they intervened in the judicial process in an arbitrary way. Yet judicial discretion came to form a crucial aspect of the way in which colonial criminal law braced civil pacification. This is most clearly represented in the tension between the premise of individual responsibility for a specific offence, and the deduction of criminal intention from membership of a particular community, or a suspect way of life. The reforms of 1772 included one significant foray into substantive law, in the form of Article 35, for punishing dacoits.¹¹² This article laid down that every dacoit

¹⁰⁹ Earlier too, the British supervisors sent to the districts in 1769 to explore ways of raising the revenue had, been instructed to check judicial venality: 'you should recommend the method of Arbitration to any other and inculcate strongly in the minds of the people that we are not desirous to augment our Revenues by such Impositions.' The Court of Directors had ordered the complete abolition of the fine as a penalty in the *faujdari adalats*. However the Committee of Circuit said they had retained it as an alternative to corporal punishment for men of 'caste and rank' found guilty of petty misdemeanours, Article 11, Committee of Circuit to Council at Fort William, 15 August 1772, *Supplement*, p. 11.

¹¹⁰ A fee computed as a certain percentage of the value of a suit was taken in the civil courts. It was abolished in 1793 but reintroduced in 1795, and with it a fee on exhibits and the requirement of stamped paper. Firminger, *Fifth report*, pp. 63-4.

¹¹¹ *Jailkhana*: jailhouse. The colonial prison replaced forms of punishment which cast the prisoner back into society disgraced or mutilated. It symbolized a commitment to fixed measures of punishment and an undertaking to oversee it, even if this meant a regular expenditure on the maintenance of prisoners. There were no charges for initiating a trial in the criminal courts, and the government gave maintenance money to witnesses who were summoned. However, these provisions did not apply to a certain class of complaints characterized as 'vexatious' and 'frivolous'.

¹¹² This provision was formulated without assessing its compatibility with the Islamic law. Article 35 'does not appear to have been long, if it ever was,

on conviction, shall be carried to the village to which he belongs; and be there executed, as a terror and example to others; and . . . the village of which he is an inhabitant, shall be fined . . . and . . . the family of the criminal shall become the slaves of the state; and be disposed of, for the general benefit and convenience of the people, according to the discretion of the Government.¹¹³

An address which Hastings made to the Council on 10 July 1773 suggests that the kazis and muftis of the faujdari adalats were not using Article 35 very enthusiastically.¹¹⁴ The article prescribed capital punishment for dacoits, but

the moulavies in the provincial courts refuse to pass sentence of death on decoits, *unless the robbery committed by them has been attended with murder*. They rest their opinion on the express law of the Koran, which is the infallible guide of their decisions.¹¹⁵

Some months later Hastings was complaining that the maulvis of the courts did not draw a distinction between the 'raiat (peasant), who, impelled by strong necessity, in a single instance, invades the property of his neighbour and (on the other hand) the dacoit, robbers on the highway, and especially to such as make it their profession.'¹¹⁶ But on what criteria, after all, did Hastings want the judge to distinguish between the one-time offender and the professional robber? Hastings was suggesting that dacoits suffer the penalties of article 35 on the basis of their public notoriety, rather than on proof of responsibility for a specific act of robbery and murder.¹¹⁷ The

regularly enforced'. Yet Cornwallis cited it to argue that Parliament had allowed the Company to modify the Islamic law. Enclosure in letter from Committee of Revenue to GG and Supreme Council of Revenue, 20 October 1785, BRC P/50/61, 21 December 1785, No. 55. GG Cornwallis, minute, 3 December 1790, BRC P/52/22, 3 December 1790, paras 19–21, pp. 212–13.

¹¹³ The regulation was justified as a necessary measure of rigour, 'since experience has proved every lenient and ordinary remedy to be ineffectual.' Article 35.

¹¹⁴ Letter from WH, 10 July 1773, *Supplement*, pp. 114–19. In 1772 the Nizamat Adalat had been shifted from Murshidabad to Calcutta, and in 1773 Hastings had taken it under his own supervision. This brought him into contact with the Islamic law as administered by kazis and muftis and it was probably this which prompted the address.

¹¹⁵ *Ibid.* Emphasis mine.

¹¹⁶ Extract from progs of Governor and Council, 19 April 1774, *Supplement*, p. 122.

¹¹⁷ Hastings argued that dacoit chiefs ought to be summarily condemned to death on the basis of establishing their identity; *ibid.*

Committee of Circuit conceded that the measure 'in some respects involves the innocent with the guilty', but retracted this admission with the argument that the dacoits of Bengal

are not, like robbers in England, individuals driven to such desperate courses by sudden want: they are robbers by profession, and even by birth; they are formed into regular communities, and their families subsist by the spoils which they bring home to them; they are all, therefore, alike, criminal wretches, who have placed themselves in a state of declared war with our Government, and are therefore wholly excluded from every benefit of its laws.¹¹⁸

What was being suggested was that the judge should use a different and lesser standard of evidence to hang a man if he was notorious as a bandit. In addition, that the offender's family and community also be punished, on the presumption of collective criminality. Article 35 encapsulated the recurrent contradiction between, on the one hand, defining an equal and uniform liability to the law and, on the other, the pressure to retain areas of judicial discretion in the form of special criteria for conviction.

Officials of an Orientalist inclination, such as Hastings, had argued that it was the natural right of Indians to be ruled by the laws and customs with which they were familiar and that these laws were not antithetical to reason, humanity and natural justice.¹¹⁹ In maintaining that the doctrines of Hinduism or Islam contained the same truths which made up the universal nature of man, Orientalist scholars provided arguments for the feasibility of establishing dominion on the basis of the laws and customs of the Indian people. 'Every instance that brings their real character (i.e. that of Indians)

¹¹⁸ Committee of Circuit to Council at Fort William, 15 August 1772, *Supplement*, p. 13.

¹¹⁹ Verelst, like Hastings, had opposed the introduction of English law for the inhabitants of Bengal. The natural rights of man had to be protected, but the means of doing so, had to relate to their habits of mind. *A view of the rise, progress and present state of the English Government in Bengal*, 1772, pp. 139–40. See A. Embree, *Charles Grant and British Rule in India*, 1962, pp. 148–9 for some contemporaries of Grant who held these views. Halhed, who translated a 'code' of Hindu law worked out by eleven Pandits, a project which had the patronage of Hastings, claimed that the laws, 'abound with maxims of general policy and justice, which no particularity of manners, or diversity of religious opinions can alter.' Halhed's 'Preface to a code of Gentoo laws', (the Manava-dharmastra), in P.J. Marshall (ed.), *The British discovery of Hinduism in the eighteenth century*, 1970, p. 181.

home to observation', wrote Hastings, 'will impress us with a more generous sense of feeling for their natural right, and teach us to estimate them by the measure of their own.'¹²⁰ But when certain presumptions of British justice, such as the right of habeas corpus, or individual liability to the law, had to be kept at bay or qualified, then cultural particularity was invoked with a different inflection, to stress that India stood on a lower rung of the civilizational ladder than England.¹²¹ The Mughal precedent was cited to justify extraordinary measures to 'strike at the root of such disorders as the law will not reach.'¹²² Interestingly, Hastings also argued that a lower standard of conviction for dacoity would extend, not erode the principle of due process by reducing the need to use torture to extract a confession. The difficulties of the Islamic law of evidence were such, he said, that guilt was often established on the basis of confession alone, 'and this has occurred in so many instances that I am not without a suspicion that it is often obtained by improper means.'¹²³

It has to be remembered however that the standards of proof required by Islamic law were being lowered in a context in which the defendant did not have the protection of trial by jury or well-established laws of criminal procedure.¹²⁴ To permit a prisoner to be convicted on notoriety was to leave considerable discretion in

¹²⁰ WH to Nathaniel Smith; *ibid.*, p. 89.

¹²¹ 'We confess', wrote the Committee of Circuit, referring to Article 35, 'that the means which we propose can in no wise be reconcilable to the spirit of our own constitution; but until that of Bengal shall attain the same perfection, no conclusion can be drawn from English law, that can be properly applied to the manners or state of this country.' Committee of Circuit to President and Council, 15 August 1772, *Supplement*, p. 13. Cf. also WH to Josias Dupre, 8 October 1772, expressing his apprehensions about the effect which judicial innovations in England might have for the Company's legal arrangements in India. Gleig, *Memoirs*, p. 263.

¹²² Committee of Circuit to Council at Fort William, 15 August 1772, *Supplement*, p. 13. A rigid observance of the law, Hastings stated, was a blessing in a well-regulated state, but in Bengal an extraordinary coercion was needed. WH, 10 July 1773, in *Supplement*, pp. 114–19.

¹²³ Extract from progs of Governor in Council, 19 April 1774, *Supplement*, pp. 120–1. The use of torture in revenue and police process in India was described as a legacy of Oriental government, but it was also considered one of the peculiar characteristics of Indian crime. A specific category of offence, 'dacoity-with-torture', would be formulated for India.

¹²⁴ Islamic laws of evidence began to be modified to make prosecution easier.

the hands of the Indian *darogha*, kazi and mufti of the adalat.¹²⁵ Yet judicial discretion in the hands of Indian agency was said to be always exercised with venality.¹²⁶ The issue of sentencing offenders to 'confinement at pleasure' exemplifies the way in which the principle of judicial discretion was simultaneously criticized and re-admitted in colonial law-making.

Imprisonment was not one of the fixed penalties prescribed by Islamic law.¹²⁷ But one of the forms of *tazir*, discretionary punishment, left to the judge was the confinement of the offender 'till repentance'. This meant in effect, imprisonment till the judge decided he could be released, a sentence summarized as 'confinement during pleasure'. However confinement was not only a punishment in itself but also a means of enforcing other forms of restitution — to make the prisoner pay blood-money, restore the goods he had stolen, or persuade his friends and associates to pay ransom for his release. Furthermore, the offender who escaped one of the fixed Islamic penalties on account of inadequate evidence, could be sentenced to confinement during pleasure on the basis of strong suspicion. Where the degree of suspicion was lower still, he could be confined till he found someone to stand surety for his good behaviour. If the prisoner was a stranger to the locality, or too notorious, or too poor to find a guarantor, then this could amount again to a sentence of 'confinement during pleasure'.¹²⁸ In their responses to the queries circulated by Governor-General Cornwallis in 1789–90, British magistrates criticized 'confinement during pleasure' as too lenient for offences such as dacoity, and as instrumental to corruption.¹²⁹ But they also criticized it as too severe a penalty in other cases, for it could mean a virtual life sentence.

¹²⁵ Here *darogha* refers to the supervisor of the court, a position resembling that of the judge-magistrate.

¹²⁶ See below.

¹²⁷ Nor did the regulations of 1772 introduce specific terms of imprisonment for specific offences. They merely authorized Indian *daroghas* of the faujdari adalats to use 'corporal punishment, imprisonment, sentencing to the roads and fines'. Cf. Article 29.

¹²⁸ Cf. *Justice and police in Bengal*, pp. 238–9, 300–1. Also, BRJ, P/127/73, 6 May 1791. The surveillance which British magistrates began to exercise over the faujdari courts had probably escalated the use of 'confinement during pleasure' because they discouraged fines.

¹²⁹ Commr Bakarganj, and Magts, Birbhum and Bishanpur, BRC P/52/22, 3 December 1790, pp. 299–300, 328. Cf. also Thomas Law, *A sketch of some late arrangements*, p. x.

Here the reasoning was that such indefinite sentences removed productive hands from the community and saddled Government with the expense of maintaining prisoners.¹³⁰

When the Indian daroghas of the adalats were dismissed in 1790 and replaced by British judges of the Courts of Circuit,¹³¹ the cases of those sentenced to 'confinement during pleasure' were reviewed and many released for want of sufficient records.¹³² Regulation 14 of 1797 prohibited the penalty of indefinite confinement. But a sense that the Bengal districts were being overwhelmed by banditry created a pressure in the opposite direction. Another provision for apprehending a person on suspicion of being a 'notorious robber', a 'vagrant' or a 'disorderly and ill-disposed' person, and confining him if he could not provide a security for his good behaviour, began to be extensively used.¹³³ This was supposed to be a preventive rather than punitive measure, but in effect it reintroduced 'confinement during pleasure' for cases in which guilt could not be conclusively proved.¹³⁴ Lord Moira would describe this procedure as 'an anomaly . . . wholly discordant to the legal practice of England, which knows no middle stage between conviction and acquittal.'¹³⁵

¹³⁰ Commr Bakarganj, pp. 324-5; Gaya magistrate, pp. 513-15 criticizing the too frequent use of perpetual imprisonment; *ibid*.

¹³¹ Cornwallis abolished the faujdari courts and substituted Courts of Circuit with two covenanted servants of Company as judges, assisted by a kazi and a mufti. Thereafter each case was tried at two levels, first by the kazi and the mufti according to the Islamic law, then by the British judges who had to consider whether the fatwa was 'in consonance to Natural Justice and at the same time in conformity to Mahomedan Law under the already proposed modifications'. If the judges disapproved, then the trial was to be referred to the Nizamat Adalat.

¹³² *Justice and police in Bengal*, p. 283. Cf. J. Fombelle, Magt Bhagalpur, to a police committee, 31 July 1799, attributing an increase in gang robbery to these releases: 'The refined principles of justice, upon which is founded the criminal jurisprudence of enlightened European nations, are ill-calculated for the degenerate race who are a scourge to the peaceful and the well-disposed.' In K.K. Datta (ed.), *Selections from the judicial records of the Bhagalpur district office*, 1968, pp. 49-62.

¹³³ Reg 22, s 10, Bengal 1793; Reg 17, s 10, 1795, Banaras. (Regulation, section, clause; Reg, s, cl). Even if a person was acquitted of a specific charge, the Courts of Circuit and the Nizamat Adalat could require security for good behaviour if the trial had indicated that he was a notorious or dangerous character, and confine him for failure to provide it, Reg 53, s 2, cl 6, 1803.

¹³⁴ See chapter five for a further discussion of this provision.

¹³⁵ Judicial minute of 2 October 1815, PP 1819, vol. 13, p. 152. He

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The judicial plan of 1772 evolved by Hastings and the Council had its critics within the Bengal establishment. In his brilliant exposition of the debates around a permanent settlement of revenue, Ranajit Guha explains that for Philip Francis it was not the law which would institute civil order, but the stabilization of the property rights of the zamindars and their co-operation in civil administration.¹³⁶ Thomas Law and Cornwallis also wanted to rehabilitate the zamindars as improving property owners, but without any feudal authority in the matter of criminal jurisdiction.¹³⁷ The themes of security for property, civil order and a 'spirit of industry' raised in discussions about a permanent settlement,¹³⁸ were invoked in criminal justice as well but with different tonalities and a different notion of agency.¹³⁹ Here civil order was conceived of as a routine state of pacification in which the state alone had the right to a legitimate exercise of violence. Rule of law had to communicate a promise of rights, but also one of subjection. Property would be secured against 'arbitrary' mulcts, but the dues of the state would have to be

attributed it to the prevalence of perjury and the difficulty of obtaining evidence.

¹³⁶ *A rule of property for Bengal*, 1982, p. 152. For Francis, writes Sophia Weitzman, the zamindar's judicial powers were not usurped from the State, and to take them away was to violate the 'old constitution.' *Warren Hastings and Philip Francis*, 1929, p. 61.

¹³⁷ *A rule of property*, pp. 111, 170-1, 176-7.

¹³⁸ 'An established idea of property', wrote Dow, 'is the source of all industry among individuals, and of course, the foundation of public prosperity.' Secure in their right of property the zamindars would invest capital in agriculture, choose higher-value crops, and add to their stock of labour. This, argued Francis, would also yield benefits in terms which could not be computed: 'The Employment of the poor and Idle and even of Women And Children; — the Habits of Industry which such employment creates; — the Encouragement to useful Population by furnishing it with Nourishment thro' the medium of Employment; — and the general Increase of Circulation. . . ' 'Improvement by Europeans' (nd), sent to W. Ellis on 20 November 1776. This extract is from *A rule of property*, p. 105, n. 70.

¹³⁹ For instance, Hastings said that by re-appointing faujdars to check banditry, cultivators could more easily pay Government's dues and a state of security would allow the improvement of the land. '(M)any villages, especially in Jessore and Mahmudshahee,' he pointed out, 'pay a regular *Malguzaree* to the chiefs of the Decoits'. Extract from progs of Governor in Council, 19 April 1774, *Supplement*, p. 125. *Malguzari*: land tax.

accepted as a fixed sum, not as an amount negotiable from *kist* to *kist* depending on the degree of resistance brought to revenue payment.¹⁴⁰ The criminal regulations of the Company were also supposed to encourage the spirit of industry but through the agency of the police and the penal regime. The 'ill-disposed and disorderly vagrant', or the 'robber by profession' would have to make reparation for his predatory existence on the industrious.¹⁴¹

The changes introduced to conceptions of sovereignty and property right had repercussions for the agencies of governance. The loose inter-dependency of official and non-official agencies which I have described for the Mughal and eighteenth century regimes gradually developed towards more bureaucratized hierarchies which centralized military and judicial functions and separated them from property relations. This will be illustrated through an exploration of the Company's changing relationship to the agency of the powerful revenue farmers of the Banaras Zamindari, culminating in 1807 with the move to deny them police powers. The shift from the designation of *amil* to that of *tehsildar* from contractor in power or sharer in kingship to a bureaucratic office under the British collector, was important to the different standards of order being demanded.¹⁴² These changes also altered the process of information-gathering which had hitherto associated local notables with the decision-making process. As C.A. Bayly put it, the memorials and reports sent in on the basis of this consultation used to constitute 'a dialogue on rights and duties between subject and ruler', not just an administrative procedure;¹⁴³ and the terms of the dialogue were changing.

¹⁴⁰ *Kist*: revenue instalment. In Bengal this proposition applied pointedly to the zamindars and intermediary revenue farmers who were suspected of encouraging banditry to resist revenue payment. Cf. WH's letter of 10 July 1773, *Supplement*, pp. 114-15. In Bihar and Banaras, colonial 'due process' was directed against communities of small zamindars. Jonathan Duncan hoped that a permanent settlement would induce 'restless and intractable Rajput communities and 'obstinate' Brahmins to stop from throwing the country into confusion. But confinement in the civil jail and criminal process in certain instances was the other line of action he adopted against recalcitrance in revenue payment. Cf. RB to GG in C, 25 November 1790, in *Banaras affairs (1788-1810)*, pp. 194-240, and chapter three.

¹⁴¹ See chapters two and five.

¹⁴² *Tehsildar*: revenue collector for the tehsil, a revenue unit.

¹⁴³ C.A. Bayly, 'Knowing the country: Empire and information in India', *MAS*, 27, 1 (1993), pp. 3-43.

The Company tapped the same pool of service literati which the Mughal state and its successors had drawn upon. But kazis and *qazis* were being reappointed to judicial office, not to uphold the *sharia*, but to associate the Company with Mughal notions of sovereign authority and its punitive functions. Yet the Company also had to negotiate with the sense of social status and meaning about 'law' that Islamic law officers and pandits brought into the domain of colonial justice. More generally, the Company's legal procedures indicated an uneasy relationship with the functions of Mughal bureaucracy which had engaged with regulation, with everyday disputes centred on codes of conduct and social behaviour.¹⁴⁴

The institutionalization of a sphere of authority which had been left much to discretionary exercise before, and regarded as subsidiary to the punishment of rebellious tributaries, led to the unprecedented generation of a body of records relating to judicial justice. The quarrels, disputes and injuries of even the most insignificant subjects of the Company could leave their mark on the records if they established a particular precedent in the law. The chapter which follows uses the judicial records of the Banaras Zamindari to examine the opening phase of this sphere of authority slowly taking shape over the erosion of military power.

Chapter four.

¹⁴⁴ The Indian judges of the faujdari adalats in Bengal were directed to keep records of all cases and the sentence. From 1772 such records were kept at the Nizamat Adalat through the President in Council. 'As the decrees of the Nizamat Adawlut in its first proceedings were likely to become a precedent for all future cases to which they might be applied', reported the President, 'I was at some Pains and employed much Time in revising them'. 'Office of the Daroga.' Progs of Council of Revenue, 3 August 1773, in *Bayly, Early administrative system*, vol. 1, pp. 456-7, 483-4, 493-4.

Chapter Two

Civil Authority and Due Process: The Banaras Zamindari, 1781-1795

In asserting new notions of sovereign right, in outlining a new identity, that of the legal subject, colonial law-making was drawn into a variety of conflicts with competing sources of identity and authority. This process fostered a cognitive reassessment of the state and its agencies at various social levels, setting in motion complex currents of alienation, but also of adjustment. At the same time, colonial reformulations of sovereign right had to find expression through the existing agencies of order and information. Company officials also groped for images of social order and frames of moral reference within which to embed the judicial claims of the state. Colonial justice was therefore refracted through many layers of authority, and all these left their mark on its institutions and procedures.

The cases recorded in the correspondence between the Banaras resident and Fort William were those in which the resident had intervened to press the investigation in a certain direction, or questioned the reasoning by which injury had been assessed, guilt and responsibility assigned, and the form and measure of punishment determined.¹ Legal shifts revolving around the themes of criminal intention, premeditation, and mitigating circumstances, now began to alter the expectations of parties brought to the

¹ Cornwallis had asked Duncan to report every instance of his deviation from the Islamic law. Cf. RB to GG in C, 11 January 1789, BRC P/51/32, 4 February 1789, p. 168. Cornwallis drew upon this correspondence to frame some of the arguments on which he outlined the judicial 'reforms' of 1790. BRC P/52/23, 3 December 1790, p. 219. British collectors in Bengal proper at the time were not supposed to interfere in the faujdari adalats supervised by the Naib Nazim, Muhammad Reza Khan. In practise they intervened in trials but they had no formal authority to do so.

criminal courts, and to reduce the weight of negotiations between plaintiff and offender in the formal procedure of the trial.² These shifts also began to change the presumptions on which the accused framed a defence, or made a confession, with certain consequences for procedures of prosecution.

The triangle of state, plaintiff and defendant provides only one context for the assertion of various concepts of rights and justice. Normative codes regarding age, gender and rank were evoked in various other contexts as the jurisdiction, agencies and procedures of colonial law began to take shape. The next section examines some of the changes taking place in the formats for investigation and testimony.

The Surathal: From Amil to Police Darogha

The Company's adalats marked a symbolic encroachment upon the kingly prerogatives claimed by the Banaras raja, the powerful revenue farmers of the Zamindari, and the Maratha chieftains who came on pilgrimage to the holy city.³ The adalats which Duncan instituted for the towns of Ghazipur, Jaunpur and Mirzapur were also directed towards encouraging the commercial classes and the service literati to align their interests with the Company, by making them aware of a power superior to that of the local farmer of revenue or customs.⁴ Yet this attempt to create a sphere of

² Of course, the threat of prosecution was still used to secure restitution or compensation outside the courts.

³ The new terms of public order in Banaras city were brought home to the raja when his deputy was reprimanded for arresting a revenue defaulter without applying to the Banaras adalat. CPC, vol. vi, No. 467, 27 April 1781, p. 163. Markham, resident, to GG in C, 1 April 1782, Letter book of RB, pp. 138-9, IOL. A Maratha chief who had imprisoned one Goobar Dass was told that everyone, irrespective of rank, had to submit to the Banaras adalat in acknowledgement of the Company's sovereignty. G. Cherry, Agent to the Governor General (AGG), to Raghuji Bhonsla, 9 October 1792, Duncan Records (DR), Basta 11, No. 63, October 1792, RAA.

⁴ Cf. RB to GG in C, 6 February 1788, BRC P/51/16, 1-29 February 1788, p. 452; RB to GG in C, 13 March 1788, BRC P/51/17, 26 March 1788, pp. 718-25; RB to GG in C, 31 March 1788, BRC P/51/19, 11 April 1788, pp. 300-1. The judges were paid out of the Company's share of the Banaras revenues and investiture ceremonies established that their authority flowed from the Company not from the raja. However, in the *mulki adalat*, which had criminal jurisdiction over the countryside, one judge was appointed on

judicial authority transcending the 'summary and arbitrary' power of the amils, was undercut by a continued dependence upon them for order and information, especially in the *mufassil*.⁵ The guarantee for the collection of revenue rested on the security which the amil gave for its collection, not on procedures of sale for arrears overseen by the courts. The amil was not an employee in a bureaucratic sense but still a contractor in power, who secured advances from bankers for the regular payment of revenue, organized a variety of smaller revenue collecting arrangements with zamindars and petty *mustajirs*, and brought the right mix of force and diplomacy to his dealings with recalcitrant landholding communities.⁶ The amils could now apply to the Company for substantial military force, but the powerful among them could use this assistance to aggrandize land rights on their own behalf. The resident had to recognize the amil's authority to levy *tala'iana*, fines, from defaulters, to confine them for arrears of revenue,⁷ and sometimes to levy collective fines for a robbery.⁸ The smooth collection of

behalf of the resident, the other on behalf of the Raja. RB to GG in C, 12 September 1788, BRC P/51/25, 1-10 October 1788, pp. 118-21.

⁵ In the towns the judge-magistrates supervised policing, but in the countryside, this responsibility still rested with the amils. They were allowed a deduction of 1½ per cent on the revenue for bankers' charges on the security they had to provide for its payment and 10 per cent to cover their profits and the expenses of policing. *Amil*: here, revenue farmer; *mufassil*: interior, area away from the headquarters or city.

⁶ *Mustajir*: here, smaller revenue farmer. Cf. *District Gazetteer Ghazipur*, p. 105 and *District Gazetteer Jaunpur*, Allalabad, 1908, p. 96 for the powerful amils, Deokinandan and Sheo Lal Dube's careers in estate building. A judge described Sheo Lal as 'holding . . . avowedly or covertly as proprietor or farmer or mortgagee, nearly half the lands of that district [Jaunpur] . . .'. The former kotwal and the faujdari Nazir had been his retainers. Second judge Banaras CC to Regr NA, 15 December 1815, Bengal Judicial (Criminal) Consultations (henceforth BCrJ) P/132/42, 12 July 1816, No. 17.

⁷ In 1794, discussing the extension of the Bengal regulations to the Banaras zamindari, Duncan argued that allowing the amil to confine people or to levy *talabana* might still be preferable to the public sale of estates. RB to GG in C, 22 July 1794, Bengal Judicial Consultations (Civil), 128/14, 19 September 1794, pp. 125-8. *Talabana*: daily fee payable to the officer serving summons.

⁸ In his *kabuliyat*, revenue farming contract, the amil undertook to make good the loss arising from any theft or robbery in the jurisdiction of his revenue farm. But he also claimed the right to recover this amount from the zamindars who were supposed to share the responsibility for policing. For instance, the resident authorized the amil of Kantit to reimburse himself from

revenue depended on the amils' ability to broker a variety of smaller revenue farming engagements, secured wherever possible with *malzamin*, *faizamin*, *bazirzamin*, that is sureties for payment, for good order, and for attendance when required. In this period the same chain of responsibility was pressed into service for policing and prosecution, for enforcing a fine, securing the presence of a party in court, or imposing a *muchalka*, an undertaking for good behaviour. The guarantee of enforcement lay in the monetary or social credit of the person who stood surety, or in his relationship to the person giving the engagement. But sometimes a Brahmin was made a surety with the idea that he could go on a fast or threaten some other form of self-injury to enforce the engagement.⁹ The element of pressure lay in the infamy of causing a Brahmin to suffer, worse still of being responsible for making a Brahmin shed his blood.¹⁰ Thus, when Kishan Kachchi was wanted for the murder of his daughter, the zamindar placed people over his house and crops, and sent for Kishan's surety one Sheo Lal Misser, a Brahmin who 'after suffering the strongest urgency', induced him to make an appearance in court.¹¹

In parganas patterned by small zamindari holdings it was the amil's kachcheri which was often the site of preliminary investigation, where his agent would take down the *zebanbundies* of the

the zamindars for an indemnity he had paid to merchants robbed in that pargana. Progs of RB, 16 April 1788, Basta 20, Register No. 5, April 1788, RAA.

⁹ See chapter three for further details.

¹⁰ Cf. W. Tennant, *Indian recreations*, vol. II, second edition, 1804, pp. 260, 318.

¹¹ BRC P/52/17, 25 August 1790, p. 749. Contrary to official belief, the Brahmin was not always successful. The amil of Lakhnesar asked to produce one Ramsahay in court, said he had persuaded the man's uncle 'to give Sabun Pandeh as his *Hazir Zamin*, or Bail, to bind him to produce his said Nephew. . .'. However, though the Brahmin went on fast to enforce the agreement, the uncle changed his mind. RB to GG in C, 1 February 1789, BRC P/51/32, 18 February 1789, p. 661. It was through this same system of finding sureties that a landholder secured his release when confined for revenue arrears. Jagganath Singh, the rebellious Bais zamindar of pargana Sikandarpur, was allowed to return home only when another group of influential zamindars, the Sengars, stood *hazirzamin* for him. They in their turn took counter-security for him from his 'creditable relatives'. On his second detention for rebelliousness, it was the Kaushik zamindars who stood surety, BCrJ P/128/20, 5 June 1795, pp. 1-122.

various parties and send them upto the adalat.¹² If the British resident or judge of one of the adalats sought information from the mufassil, they would apply to the amil who would call upon his *naib* to proceed to the spot, accompanied by the local kazi, mufti and the *canungos*, to consult with the zamindars, the chaudhries and the *ashraf*, i.e. with the 'respectable' sections of village or small town society, and to send a *surathal*, a report of events. The influence of these notables stemmed not only from their association with the machinery of revenue collection, but also from their personal status, as landholders, or as members of a locally entrenched service literati, and from their ability to hold their own in engagements with the wider world. Buchanan gives a rather unkind description of the contrast between those among the *ashraf* and the *bhalamanas* who had a presence in public life and those who did not.¹³ The former were called *darbaris*, that is people who could face the judge-collector or other such great personage, but

A great many called *Gharaiyas* never if possible, venture into such presence; and when they do, seldom find utterance, but if they are able to speak at all, it is in a roar like great bulls, they being mere clowns.¹⁴

At this point, the *surathal* was a form of composite attestation, the product of a consultation between men of 'credit and influence', those deputed by the amil and those from the locality, rather than

¹² *Kachcheri*: place for public business, here for the collection of revenue; *zebanbundies*: oral depositions. It is significant that the amil was often given the Mughal appellation of *faujdar*. Cf. deposition of the *zillahdar* and *canungo* of village Berowly in which they referred to the amil's agent as the '*naib phousdar*' and to his camp as the '*phousdary rutcherry*'. Extract progs of RB 9 December 1788, PP, 1821, vol. 18, p. 303. Before the institution of the adalats the complaint would often have been resolved at this level. Thus it was to the amil's *naib*, deputy, that Jhengur Brahmin complained that Chotuk Brahmin had poisoned his mother and robbed them. The *naib* imprisoned Chotuk who then persuaded Jhengur to accept compensation. The *razinama*, deed of agreement, would have been lodged with the *naib* and the matter concluded, but the amil sent the parties to the resident. BRC P/51/27, 28 November 1788, pp. 495-503.

¹³ *Ashraf/bhalamanas/sharif*: the respectable, the genteel; *canungos*: district-level record keepers.

¹⁴ 'An account of the northern part of the district of Gorakhpur', Buchanan-Hamilton, Mss Eur D. 91, p. 3, IOL. *Darbaris*: courtiers, those used to attending upon the great; *gharaiyas*: householders, cultivators.

a document relying on eyewitness testimony.¹⁵ A *surathal* investigating a homicide, or some local disturbance would typically read this way, 'the men were apprehended and sent up to the resident with a *surathal* from the *naib* of the amil based on testimony from the *chaudhries*, *canungos* and headmen . . .'.¹⁶ This document certainly provided background information and established that a complaint had some foundation. For instance when a widow petitioned for property plundered from her during the 1781 rebellion, the amil's agent took a statement on oath from the 'responsible people' of the village to verify the incident, before the complaint was investigated in the adalat.¹⁷ However, the weight of the *surathal* in the establishment of guilt or responsibility for a particular offence is not easy to determine. Perhaps this indicates that the investigation was often directed towards securing a *razinama* (deed of agreement or satisfaction) between the plaintiff and his opponents, rather than towards a clear-cut verdict of guilty or not-guilty. This was particularly so when the amil felt the matter was compromising the smooth collection of revenue.¹⁸ In cases where the hakim adopted a more punitive stance, the *surathal* probably influenced his verdict since responsibility for order was so strongly intertwined with the chain of authority which had shaped it. The social weight behind the *surathal* may have also influenced the individual depositions sometimes submitted with it, or the

¹⁵ Subsequently, the police darogha's *surathal* was supposed to distinguish between eyewitness and hearsay evidence, Reg 20, s 13, cl 2, 1817.

¹⁶ Cf. *surathal* sent by the *naib* in pargana Kerakut, RB to GG in C, 21 June 1789, BRC P/51/39, 1 July 1789. The *canungo*'s role in representing the zamindars' point of view to the ruling authority and in bringing revenue transactions to a successful conclusion was particularly significant. Cf. 'Translation of the State of the Pergannah of Beluah (Ballia) as represented by the Amil Ram Chund Pundit with Orders thereon', BRC P/51/49, 21 October 1789, pp. 958-9.

¹⁷ RB to Sub-Secy, 31 December 1790, Bengal Revenue Judicial (henceforth BRJ) P/127/71, 14 January 1791.

¹⁸ In a clash between Roop Chand, a revenue farmer, and Hari Tewari, a brahmin cultivator, over revenue payment the latter's wife burnt herself, allegedly in protest against Roop Chand's harshness. The judge of the Mirzapur adalat gathered reports from the *zillahdar*, the *canungo* and residents 'of all castes' which did differ in some respects from Roop Chand's account. However, the trend of the investigation was towards reconciling the parties to restore the process of revenue collection; it did not dwell at length on the woman's death. Progs of RB, 9 December 1788, PP 1821, vol. 18, pp. 303-15.

nature of subsequent examinations. For instance, it could discourage the accused from withdrawing a confession. In one case a surathal, attested by three canungos and two villagers, reported that Soobode Kwyree had confessed to murdering a child for its ornaments, on condition of being spared. Kwyree retracted his confession before the amil, but the surathal probably encouraged the officers of the court to persist in persuading Kwyree, 'in terms of Encouragement, or Kindness to tell what the real Truth was.' Kwyree confessed and was hung.¹⁹

The amil's delegates did not always succeed in getting local notables to verify a surathal if it implicated a man of some standing among them or if they did not accept the legitimacy of the intervention. In a long vendetta between two Rajput families, the *sazawal* of pargana Lakhnesar reported that he had gone to the village accompanied by the kazi, canungo, chaudhries and other 'creditable people', and they had concluded that Lekh Roy,

hath been guilty of both treachery and fault in the killing of Phelwan Roy, but the principle People of the part, as they were partial to him, did not put their Signatures to the Zobaundy, [zebanbandi] and Statement . . .'.²⁰

However, there were other ways of imposing a chain of responsibility, expressive of elite attitudes towards social groups such as the poor and low caste who filled the ranks of the village watchmen, and wandering communities such as the Sair Bajuas, Geedarmars and Karawals, who derived their living from hunting, begging and subsidiary labour at harvest time.²¹ There are two major

¹⁹ Extract from progs of RB, 18 October 1788, BRC P/51/27, 28 November 1788, pp. 513-31.

²⁰ RB to GG in C, 1 February 1789, BRC P/51/32, 18 February 1789, p. 660. Lekhraj, who owned the fort considered it a point of honour not to divulge who had been in the fort or fired the fatal shot from it, declaring, 'the crime is on my head, I know not the name of any other, nor will I mention any.' He said the prosecutor had unfairly sought that relief from government 'which their forefathers used to seek from their Swords and in mutual revenge.' It would seem that the 'principle People' of the locality shared this opinion. Ibid., pp. 649, 653, 656. *Sazawal*: officer appointed to collect the revenue in place of the zamindar or revenue-farmer.

²¹ Magistrates sometimes arrested men from low caste or wandering groups on the representation of 'respectable inhabitants' when there had been some local robberies. Cf. Magt Chapra to Sub-Secy, 4 May 1793, Board of Revenue, Police, vol. 2, 1793, p. 419, West Bengal State Archives, Calcutta (henceforth

investigations in these records which give us a glimpse into such methods and presumptions. In one instance Kewalram *barkat* was sent with an armed escort to Ballia and Kharid to recover money stolen from a British army officer.²² Kewalram proceeded by arresting all the *pasbans*, watchmen, of the suspected village, on the presumption that they were thieves or would know which *pasbans* were reputed to be thieves. Some of the arrested men framed their defence in terms which would sound convincing to their interrogator, that is, with an implied acceptance of the association between their profession and a proclivity for theft. Hailal Dosadh said he was not a thief but his elder brother had been one and used to deal with a merchant of Sesondah.²³ Baloodh Dosadh declared: 'I was not a Camp thief that I should rob the *pultun* but only thieved for my own livelihood'; but he offered to point out the camp thieves.²⁴ Gunga Dosadh protested that he was merely a daily labourer, but Kewalram made him name Dosadhs he thought were thieves, and he also spoke of some who had divided up silver brought 'from the Eastward'.²⁵ The interesting point is that such procedures of indiscriminate arrest and intimidation were reported to the resident in a matter-of-fact sort of way, without receiving any real check, because Kewalram claimed to be getting authentic information about a chain of patrons and receivers of stolen property.²⁶ The other major enquiry sprang from two daring raids, one in February 1792 on a merchant at Jaunpur, and another on the revenue consignment from Kharid.²⁷ Here Adhar Ahir, a *pasban* of the Jaunpur kotwali, said his children were confined in order to compel him to find the culprits.²⁸ Employees of the Jaunpur kotwali seized one Prakash Singh because they suspected his son, releasing him only when his relatives turned up two other suspects, and he gave an *ikrarnamah* that he

WBSA). Collector Shahabad to Judge, Patna 23 March 1785 in J.R. Hand, *Early English administration of Bihar*, 1894, p. 78.

²² BRC P/51/25, 3 October 1788, pp. 709-94. *Harkara*: messenger.

²³ Ibid., pp. 725-6.

²⁴ Ibid., p. 735. *Pultun*: platoon.

²⁵ Ibid., pp. 728-9.

²⁶ The investigation ended when the *sipahis* fired on a group of *pasbans* killing one, and Kewalram was recalled. Ibid., pp. 768-94. *Sipahis*: soldiers.

²⁷ RB to GG in C, 27 February 1792, BRJ P/127/78, 13 April 1792, pp. 524-889.

²⁸ Ibid.

would 'answer for' the dacoity if he could not prove their complicity.²⁹ The other line of action was the arrest of all parties of Sair Bajuas in the vicinity. One group of men and women were sent by the amil of neighbouring Azamgarh in Awadh, 'on the mere principle', reported the resident, 'that being of that caste they would be robbers.'³⁰ The investigation therefore proceeded on the assumption that it was quite legitimate to arrest members of the family or community of the offender, and that the lower orders could be roughly shaken down for information on certain kinds of crime.

Colonial regulations were formulated on the notion of individual responsibility for a particular offence. However, there were police instructions relating to 'bad-livelihood', 'vagrancy' and 'criminal tribes' which would draw upon such associations between a wandering lifestyle, low social status, and criminality, but take them much further in their implications of social marginalization. Such prescriptions also indicated a greater ambition towards extirpating a certain way of life than is evident from the policies of indigenous regimes. The police darogha was supposed to apprehend not only any 'notorious' dacoits or robbers but also all 'Geedur mars, Malachees, Syrbejuahs, or other description of vagrants . . . lurking about . . . without any ostensible means of subsistence . . .'. If the magistrate found them 'disorderly or ill-disposed' he could put them to work on the public roads or other public works for a term resting on his discretion.³¹ In other words, arrest and indefinite detention could follow from the assessment of community affiliation and a certain 'disposition', rather than from a specific offence. The vulnerability of the lowly village chaukidar carried over into colonial police practice. The magistrate could have him beaten with a rattan for neglect of duty.³²

In 1795 the amils were designated *tehsildars* to suggest that they were mere collectors of revenue, rather than contractors in

²⁹ Ibid., pp. 630-2. *Ikrarnamah*: deed of acceptance.

³⁰ RB to GG in C, 27 February 1792, BRJ P/127/78, 13 April 1792, p. 532.

³¹ Reg 17, s 10, 1795, Banaras.

³² Reg 3, s 6, 1812. Corporal punishment for neglect of police duty was prohibited by Reg 2, s 2, 1834; but even in 1848 the Patna Magistrate found it was the practise to imprison or fine a chaukidar for every burglary in his beat if he could not provide any clues. Magt Patna to Sessions Judge, 7 January 1849, in K.K. Datta, *Selections from Patna correspondence*, 1954, p. 370.

power;³³ and in 1807 police powers were taken away from them. In theory, revenue collection was now supposed to depend on the sale of land for revenue arrears, and the maintenance of order on a general obligation to respect the law rather than on discrete undertakings from zamindars and revenue farmers.³⁴ However, the taking of securities remained an important device of colonial policing, in the form of bail bonds, recognizances for keeping the peace and security for good behaviour.³⁵ The surathal was now drawn up by the police darogha appointed by the British magistrate.³⁶ The darogha was still supposed to conduct his inquest on a murder, or other heinous crime, in the presence of three or more 'credible' people who were to attest his surathal.³⁷ But the indications are that the elites were losing their interest in supporting a police process which attempted to restrict judicial and punitive authority to official agency. The colonial government had to introduce a plethora of penal provisions to force zamindars and revenue farmers to accept responsibility for giving information.³⁸

The banning of certain fiscal claims associated with the business of order and protection contributed to this situation. In March 1788 the abolition of *rahdari* and *chura*, tolls collected by amils and zamindars for their 'protection' of commercial traffic in the interior, created a vacuum in arrangements for the security of trade and markets.³⁹ The other reason for a reluctance to subscribe to

³³ In 1796 when the amils were told to receive a copy of the police regulations, Ausan Singh, one of the powerful Babus of the Darekhu Bhumihar Brahmins, felt so insulted that he threatened to withdraw his agents from the revenue farm. Cf. Magt. Ghazipur to Secy Judl Dept, 7 January 1796, BCRJ, 15 January 1796, No. 51, pp. 143-7, WBSA.

³⁴ Cf. Reg 7, 1807.

³⁵ Reg 20, 1817.

³⁶ One of the criticisms against tehsildari policing had been that it blocked information from the British magistrate. Cf. Answers to questions 19 and 20 of interrogatories of GG in C, 1801, PP, 1812-13, vol. 9, pp. 278, 285.

³⁷ Reg 9, s 18, 1807.

³⁸ Cf. Reg 9, s 13, 1808; Reg 20, s 10, s 14, 1817.

³⁹ *Rahdari*: literally, 'keeping the roads'; *chura*: sundry small tolls. There were many local disturbances on this issue as zamindars turned plunderers to pressurize traders, or refused to maintain watchmen, who began to prey on the same traffic. The Company said it would rely on 'a steady exertion of legal authority', not 'purchase' tranquillity, but many merchants found it politic to come to an informal accommodation with the zamindars for protection. Resolns of GG in C on RB's address of 25 February 1788, DR 26 March

the surathal was the fear that it might compel the signatory to give his testimony in court as well.⁴⁰ For men of 'rank and respectability' the procedures by which testimony was taken in court implied that their status by itself did not give sufficient credit to their deposition. So, even as the Company created some new formats for information for instance, its survey and census operations, its procedures of criminal justice inhibited other sources and gave the colonial darogha a very crucial position in shaping the case for trial.⁴¹

The Judicial Oath and the Issue of Veracity

The imposition of an oath on all who were brought to testify exposes another facet of the alienation of elites from some of the procedures of colonial justice. Colonial courts summoned witnesses and imposed the oath irrespective of whether they wished to attend or testify. The way in which testimony was given formerly suggests it was generally understood that witnesses produced by a particular party were there to testify on his behalf, and to establish the weight of opinion on his side. A common form of giving testimony was the *mahzar*, a declaration submitted by a plaintiff, stating the details of his case, to which the persons supporting his version fixed their signatures and seals, sometimes on oath. The idea that the judicial oath bound parties to tell the

1788, Basta No. 1, Register No. 1, March 1788, RAA. Cf. Committee for investigating the police, 31 July 1799, in K.K. Datta, *Selections judicial records Bhagalpur*, 1968, pp. 249-51; and third judge, Calcutta CC to Regr NA, 15 October 1800, BC F/4/98, reporting similar consequences of the abolition of the zamindars' claims to *sayer*, transit duties.

⁴⁰ Cf. Magt, Bhagalpur to Second Judge, Murshidabad CC, 25 November 1797, complaining of the difficulty of getting respectable persons to attest confessions. *Selections judicial records Bhagalpur*, p. 134.

⁴¹ The darogha's surathal was only supposed to assist the deposition writers of the court to examine the parties, but officials said it allowed him to assume judicial powers and use them for extortion. Dowdeswell remarked that the darogha had powers to shape a case which in England were entrusted only to a Justice of the Peace. Secy Dowdeswell's report on the police of Bengal, 29 September 1809, PP, 1812, vol. 7, pp. 610-1. Cf. also *Committee on the improvement of the mofussil police*, Bengal, 1838, paras 70-3; and Circular order of the Nizamut Adalat 16 June 1843, No. 138, p. 48; in J. Carrau, *The circular orders of the court of Nizamut Adawlut, 1796-1853*, 1855 (henceforth, *CON*) for circulars from this source).

truth, irrespective of their relationship to the parties or their willingness to testify, indicated an expansion in the claims of the state, and this registered in people's minds as an act of coercion. Moreover, men of 'credit and reputation' felt that being compelled to swear on Ganges water or the Koran in a very public forum, was a slight upon them, suggesting that they stood in the same relation to the ruling authority as any other person. They complained that this situation made them vulnerable to the machinations of their social inferiors. Munni Begum, the regent for the Bengal Nawab, said that malicious people now took pleasure in calling up men of rank before the court to submit them to this humiliating procedure.⁴² In 1794 an official enquiry concluded that the Islamic faith did not ban an oath on the Koran, but that Brahmins of a certain order were prohibited from oath-taking. But the concession which government gave was not restricted to such Brahmins alone. The judge could exempt all persons of 'high caste and rank' from the religious oath, and use a form of affirmation instead.⁴³ It was therefore not sensitivity to religious belief alone which prompted this concession but a concern that British courts were regarded as a place of dishonour for men of 'caste and respectability'. Ironically, this concession introduced a certain ambivalence into the principle of equality before the law. The oath, meant to provide a standardizing procedure for invoking legal obligation, became a sort of test of rank.

The imposition of an oath of office to encourage professional probity among the judicial personnel of the courts also raised controversies over rank. Ali Ibrahim Khan and the other Indian officers of the Banaras adalat objected to taking an oath of office before the resident.⁴⁴ Ali Ibrahim may have been reluctant to submit to a ceremony which placed him so publicly in subordination to the

⁴² *CPC*, vol. xi, 1794-95, No. 1387, p. 316. Cf. Home Misc 432 for similar objections from a group of Bombay merchants in the 1740s. Also Singha, 'A despotism of law', Ph.D., 1990, for a fuller discussion of objections to the religious oath in court.

⁴³ Cf. observations of GG in C, Bengal Judicial Consultations, Civil, P/128/12, 20 June 1794, No. 1.

⁴⁴ In 1788, Duncan had administered an oath of office to all the judges with the exception of the Banaras adalat. In August 1790 he suggested that all government officials take the same oath, and the Board approved. DR Basta 15, No. 82, October 1794, p. 8, RAA. Subsequently British magistrates had to take a similar oath not to receive any fee or reward. Reg 9, s 2, 1793.

resident.⁴⁵ But Indian officials also felt that an obligation to make a public avowal of honesty indicated an erosion of their standing with government: certainly Cornwallis' judicial minute of 1 December 1790 later expressed a great distrust of Indian agency.⁴⁶ Ali Ibrahim Khan forwarded a representation from the officers to the President in Council, reporting that they were ready to resign rather than agree. He recalled the confidence which Hastings had placed in him: 'Therefore my credit with my superiors and the Company's fame in Hindostan were spread abroad.'⁴⁷ The officers said they had joined the Banaras adalat because it was a highly respectable institution; the Company had hitherto shown a regard for their dignity. The oath ought to have the consent of the person sworn; to impose it 'occasions a diminution of our Consequence'.⁴⁸ The existing procedures of the court they pointed out, provided adequately against illegal gratification.⁴⁹ The Board agreed to dispense with the oath of office for the Banaras adalat, but it was reimposed subsequently. The resistance at certain points of indigenous elites, schooled in a certain political tradition, or in a certain legal-sacral one, to the new terms on which the colonial state sought to tap indigenous law and utilize their services to administer it, is an interesting dimension of the Orientalist enterprise. In Banaras many pandits refused to accept a position in the Sanskrit school set up by Duncan because they felt their dignity would be compromised by the suggestion of salaried employment.⁵⁰ Perhaps the

⁴⁵ After all he had been appointed hakim of the Banaras adalat by Warren Hastings himself, and till 1788, had reported directly to the Governor General. In June 1789 Duncan had suggested that Ali Ibrahim Khan should tactfully be informed of the degree to which his court was now placed under the resident's inspection. RB to GG in C, 28 July 1789, BRC P/51/39, p. 846.

⁴⁶ GG's minute, BRC P/52/22, 3 December 1790, p. 242, para 38. It was with the epithet of 'bribe-taker' that Persian chronicles used to castigate the record of some particular kazi.

⁴⁷ From Ali Ibrahim Khan, received on 5 December 1790, BRC P/52/23, No. 9, 17 December 1790, pp. 93-102.

⁴⁸ Ibid.

⁴⁹ Ibid. Before the trial the parties had to swear they would not give anything to court officials. After the decision the parties again had to declare upon oath whether they had given anything. Ibid.

⁵⁰ 'A prejudice appears to exist among the Hindus at that city against the office of a professor considered as an office or even as a service; and the most learned pandits have consequently invariably refused the situation altho' the salary attached to it is liberal.' Minute of Lord Minto, 6 March 1811, *Selections from educational records*, part 1, 1781-1839, 1921, p. 20.

tradition of *dan*, pious endowments, by which indigenous elites supported Sanskrit learning did not carry the same connotation.

The Islamic Law, the Law Officers, and the Company's Subjects

The application of Islamic law to the legal claims of the state was another issue which involved the status of the Muslim service literati, but it also opened up a wider social field for the expression of contending rights and claims.

The Company had instituted the Islamic law as the substantive law for criminal justice using the argument of 'ancient usage'.⁵¹ Certainly, the association between the sharia and the Mughal imperial tradition was of crucial importance to the Company. Yet, as outlined in the preceding chapter, much of Mughal order had depended on the executive discretion of the nazim, faujdar, or kotwal. Where offence and rebellion shaded into each other, for instance in the case of highway raiding, Mughal officers were only admonished not to be too harsh unless necessary, and not to press retribution to the point where it would disrupt the cycle of production. By their drive to bring 'order and regularity' to the administration of criminal justice, the Company's faujdari adalats therefore systematized the reference to Islamic law in ways unknown to the Mughal regime and its successor states. Nevertheless, the reference to 'ancient usage' had some substance, inasmuch as the Company's faujdari adalats could draw upon a pool of personnel trained in a certain legal and administrative tradition, the *kazis* and *muftis*.⁵² In appointing a Muslim judge to the Jaunpur adalat, Duncan had referred to the strong presence of Muslim families in that city and said the abolition of kotwali dues would assist its 'pensioned literati'.⁵³ In Ghazipur, he chose Maulvi Ameer-ullah, from a family once powerful in the region

⁵¹ Cf. Regs 4 and 9, 1804, for Cuttack, the Doab and Bundelkhand, ceded to the Company by the Marathas, stating that the Company had decided to continue with the 'ancient usage of the said province to administer justice in such cases according to the Mahomedan law . . .'

⁵² The kazi and mufti of the district headquarters were sometimes absorbed into the faujdari courts as the 'Muslim law officers'. Magt Behar to Regr NA 5 July 1792, *Selections judicial records Bhagalpur*, p. 4.

⁵³ RB to GG in C, 31 March 1788, BRC P/51/19, 11 April 1788, p. 301; RB to GG in C, 13 March 1788, BRC P/51/17, 26 March 1788, pp. 719-22.

before it was displaced by Balwant Singh, the founder of the Banaras Raj. Fazl Ali, the deceased brother of the maulvi, was at one time governor of Ghazipur and then of Azamgarh.⁵⁴ In Mirzapur, he nominated Lala Buksh Singh, saying it would please the largely Hindu commercial community there; but Buksh Singh said he would ask Ali Ibrahim Khan, the judge of the Banaras adalat, to make the other appointments.⁵⁵

However, the invocation of the Mughal past also had a certain significance for the service literati themselves. From their point of view it was this past which established the respectability of their family histories, intertwined as these were with service to the state.⁵⁶ We have a splendid exposition of the way in which the Naib Nazim of Bengal, Muhammad Reza Khan, fought a rear-guard action to defend the authority of the Nizamat in Bengal, one aspect of which was the association between an Islamic magistracy and Mughal traditions of rule.⁵⁷ Duncan commended Ali Ibrahim Khan, the judge-magistrate of Banaras, as a man of 'long official habit' and one who seemed 'exempt from Enthusiasm', i.e. free of excessive religious partisanship.⁵⁸ But in another context he would also complain that Ali Ibrahim Khan was more attached to the letter of the Islamic law regarding murder than he could have supposed.⁵⁹

⁵⁴ W. Oldham, *Historical and statistical memoir (HSM)*, 1870, part II, p. 92, n. 72.

⁵⁵ Paper of requests from Lala Buksh Singh, in RB to GG in C, 31 March 1788, BRC P/51/19, 11 April 1788, p. 304.

⁵⁶ Karam Ali inserted the history of his family into his account of the Bengal Nawabs, *Muzaffarnamah*, in Jadu Nath Sarkar (trans.) *Bengal Nawabs*, 1952, pp. 15, 19, 24, 26. Also Abu Talib, *Tafzilu'l Ghafilin* (trans. W. Hoey, 1885), reprint, 1974.

⁵⁷ A.M. Khan, *The transition in Bengal*, 1969. Reza Khan opposed the association of pandits with kazis and muftis in the courts, arguing in effect that it was the Islamic law which must be associated with the image of rule. Cf. 'translation of a memorial from the Naib Divan Muhammad Reza Khan' in D.N. Bannerjee, *Early administrative system*, vol. I, pp. 464-5, n. 1.

⁵⁸ RB to GG in C, 30 November 1787, P/51/13, 19 December 1787, p. 628. There was tension in the city over an anticipated clash between the *Bharat Milap* and *Mohurram* processions.

⁵⁹ Ali Ibrahim Khan, remarked Duncan, was 'convinced of the full propriety, not only of thus punishing murder according to the mode in which it is perpetrated, but of allowing freest scope to the Relations of the deceased to pardon this crime in all cases.' RB to GG in C, 28 June 1789, BRC P/51/39, 8 July 1789, p. 84.

The Islamic law officers co-operated with the state's drive to extend its legal claims, by helping it to draw upon traditions of discretionary punishment in the Islamic law. The law officers of the Banaras Zamindar also began to bring their punitive prescriptions in line with the colonial government's greater investment in overseeing the process of punishment. For instance, they began to recommend sentences of imprisonment for recurrent petty theft, whereas earlier they might have suggested banishment from the city or a summary whipping. They accepted that the British hakim could occasionally exercise *siyasa*, the ruler's power to inflict exemplary punishment without reference to the sharia. But they would not accept that the sharia itself could be modified. The 'Anglo-Muhammedan' criminal law therefore had to take shape through the device of presenting certain hypothetical situations to the law officers to get a fatwa more in line with official objectives.⁶⁰ The range of tensions which emerged from this process of legal reconstruction can be illustrated using the law dealing with injury to person.

Conceptions of Sovereign Right and Public Justice: Orientalists, Anglicists and the Islamic Law of Homicide

For Duncan one of the most obvious signs of a deficiency of vigour in criminal justice was that, 'since the present Raja's accession, he has not ventured, nor will of himself venture, to punish with Death, the most notorious offenders . . .'.⁶¹ Other European contemporaries had also noted the reluctance of indigenous rulers to impose

⁶⁰ For instance, if the Islamic law officer decided that the prisoner was guilty of wilful murder, the British judge had to ask him to declare the punishment which would have been awarded if (1) all the heirs of the slain had prosecuted the offender (2) if all of them had reached the age of maturity (3) if all of them had demanded *kisas*, retaliation. Cf. Reg 4, s 2, 1797 for the full development of this approach. *Elementary analysis*, I, p. 312. In later years officials of a Utilitarian bent of mind were to be very critical of this use of a legal fiction, but in this early period Islamic law brought a very useful flexibility to sentencing by virtue of its various categories of discretionary punishment.

⁶¹ RB to GG in C, 6 February 1788, BRC 1-29 February 1788, p. 413. A year later Duncan reported that he had erected permanent gallows in the fort by the river to inaugurate a judicial regime of regularity and due process. RB to GG in C, 14 January 1789, BRC P/51/32, 4 February 1789, p. 173.

the death sentence in individual cases of homicide.⁶² The friends and family of a wounded man, or of one who had been killed, would often have to carry him before the *hakim*, refusing to leave or to bury the body till 'justice' had been granted.⁶³ Such pressure was perhaps less necessary now because of the strong symbolic link being forged between sovereignty and the state's claims over the life of its subjects.⁶⁴ But colonial courts gave 'satisfaction' for such injury in terms which met the retaliatory imperative more than the restitutive one. They also framed the retaliatory measure as a sentence of death or imprisonment rather than one which left the offender maimed or disgraced within society.

The Islamic law drew the sharpest criticism from British officials for permitting relatives of the deceased to pardon the offender, or to claim blood-money, instead of insisting on retaliation. The provision which barred capital punishment, if the heirs of the victim pardoned the murderer or accepted compensation, was one which Hastings characterized as, 'of barbarous construction and contrary to the first principles of civil society by which the state acquires an interest in every member, and a right in his security . . .'.⁶⁵ As remarked earlier, by the legal school of Abu Hanifa, which the maulvis usually evoked in such cases, capital sentence could be awarded only if the instrument of death was one commonly associated with the shedding of blood. Hastings proposed that 'if the intention of murder be clearly proved, no distinction should be made with respect to the weapon by which the crime was perpetrated'.⁶⁶ He also suggested that in cases of

⁶² For instance, J. Forbes, *Oriental memoirs*, vol. II, 1813, p. 25. The exception, as pointed out earlier, was if the murders took place in the context of highway robbery or banditry, perceived as a challenge to the ruler's sovereignty.

⁶³ The brother of twelve-year-old Sheoprasad murdered by Bhowanny Buksh took his body to the mulki faujdari adalat, and when told to burn it, said he would do so only after he received justice. RB to GG in C, 22 October 1788, BRC P/51/27, 1 December 1788, p. 647. In 1799 the Nizam Adalat, forbade the practice of carrying a wounded man to the police post to press for action. Circular order to magistrates, 21 February 1799, *Elementary analysis*, I, p. 532, n.

⁶⁴ See chapter three.

⁶⁵ Letter from WH, in *Supplement*, pp. 114-19.

⁶⁶ Ibid. By the Hanafi interpretation, homicide by drowning or strangling did not impose liability to retaliation, and the heirs of the deceased could claim only blood-money.

manslaughter the blood-money should not be a fixed amount, but one scaled to the degree of intention to kill or the absence of it, and to the means of the offender.⁶⁷ These proposals foreshadow the importance which the question of criminal intention would assume in the expansion of the legal claims of state over subject, as against the restitutive claims of the victim or his heirs. Cornwallis subsequently implemented these proposals in the two regulations outlined in his famous judicial minute of 3 December 1790.⁶⁸

Hastings and Cornwallis therefore shared the opinion that the Islamic law regarding offences 'of blood' concentrated too narrowly on the consequences of the criminal act for the party injured or his heirs, and on their claims to retribution or compensation instead of on the injury to the 'public interest', equated here with the claims of the state. 'The whole polity is injured by murder', wrote the magistrate of Bihar district, 'its punishment ought to be indispensable'.⁶⁹ But the responses of the plaintiffs show that their concept of justice was often at odds with the notion that death should be the invariable punishment for homicide.⁷⁰ The law of *kisas* also offended British conceptions of justice for its position that punishment could also vary with the relationship between the offender and the deceased. A master could not be put to death for the murder of his slave and parents could not be put to death for the murder of their children.⁷¹ Such provisions, declared a magistrate of Bhagalpur, destroyed, 'those ideas of Natural Justice, According to which, as well as According to the laws which prevail in more enlightened nations, criminality levels all distinctions which owe their origin to human convention'.⁷² British officials alleged that the decision of the heirs could be influenced by cupidity, by fear of the more powerful party, or by a Hindu's fear of religious discredit if he demanded capital punishment for a Brahmin. Indeed, the heirs of the deceased did make their decision

⁶⁷ Ibid.

⁶⁸ GG's minute, 3 December 1790, BRC P/52/22, paras 22-3.

⁶⁹ BRC P/52/22, 3 December 1790, p. 825. 'Murder being the most atrocious of all offences, and the whole Community being injured by its Perpetration, when proved, its Punishment should be inevitable', declared the Magistrate of Shahabad, *ibid.*, p. 833.

⁷⁰ Even though they did view the homicide as a grievous injury, often describing the perpetrator as 'wicked' or 'sinful'.

⁷¹ The usual statement made by the maulavis was 'Out of regard for the parental dignity, *kisas* does not apply.'

⁷² Magt Bhagalpur, in BRC P/52/22, 3 December 1790, p. 371.

after considering all its consequences for the relationships which bore upon their lives. The cases tried in the Banaras Zamindari give us a sense not only of these expectations but also of the opinions of the Indian judges and the Islamic law officers. This was because the number of offences actually defined in Islamic law are so limited that punishment was often left to the discretion of the judge, and because the resident consulted these officers for ways to use these discretionary powers to reshape the scale of punishment.⁷³ The plaintiffs' expectations also found some expression because their demands had a crucial influence upon the trend of judicial examination and on the final sentence. These records also indicate that negotiations between plaintiff and defendant began to be circumscribed in the formal trial, not only because of colonial modifications of the Islamic law but also because of a stricter attention to the letter of the Islamic law itself. This developed from the new insistence on record and precedent, judicial scrutiny by Islamic law officers of the superior court, and from the greater availability of the classical legal texts; in part because of the translations undertaken by the Calcutta *madrassa* founded by Hastings. For instance, cutting the nose, an act inflicting disfigurement with permanent disgrace, was not one of the punishments prescribed in Islamic law. The Mughal emperor Jahangir had forbidden the mutilation of the nose or the ears, declaring he had vowed before God that he 'would not blemish anyone by this punishment.'⁷⁴ Yet the practice had persisted.⁷⁵ The laws regulating *kisas*, allowed a life for a life, and a limb for a limb, but not a limb as a substitute for capital punishment or blood-money.

⁷³ Subsequently this interaction narrowed, as British judges replaced Indian ones, and as the Islamic law officers were prohibited from expressing their views beyond giving a *fatwa*. *Fatwa*: formal legal opinion in the Islamic law.

⁷⁴ J.N. Sarkar, *Mughal polity*, Delhi, 1984, pp. 438–90. *Madrassa*: institution of theological learning.

⁷⁵ Cf. statements of Mullooa and Budloo, RB to Sub Secy, 27 September 1794, BCrJ P/128/15, 17 October 1794, pp. 188–92, for one such sentence for recurrent petty theft, awarded by the Banaras adalat prior to Duncan's residency. Husbands sometimes claimed the right to cut their wife's nose for infidelity, a disfigurement that combined disgrace with a re-assertion of ownership. For men, unless they were slaves, such punishment usually required the sanction of someone in authority. See below, for cases in which it was considered an appropriate punishment for homicide.

Mutilation was otherwise allowed only as a hadd penalty, for a certain order of theft or highway robbery. Yet, in an earlier case of homicide the Banaras adalat had ruled that one Ramnath, who had strangled a boy, should have his right hand and nose cut off. This penalty was prescribed as a substitute for capital punishment, which could not be inflicted here because, by Hanafi interpretation, no blood had been spilt.⁷⁶ We find that subsequently the law officers would not sanction an amputation in such cases. The grandparents and parents of a boy strangled to death said they did not ask for capital punishment or blood-money, but that the nose and arm of the two offenders be cut off.⁷⁷ But the law officers of the mulki faujdari adalat now replied that the sharia did not permit such a request, and their view was endorsed by the Banaras adalat.⁷⁸ However, in a case of robbery the law officers declared that one Manorat Ahir should have a limb amputated, even though he had come to an understanding with the complainant for the restitution of stolen property.⁷⁹ The resident asked them to justify their fatwa in the light of an earlier case where they had withheld amputation because the owner of the stolen goods had not asked for the penalty. The law officers explained that robbery was an offence tried under the hadd laws, which fixed penalties for offences which infringed the rights of God, so that here neither the victim or the hakim could pardon the offender.⁸⁰ In contrast, retaliation for corporal injury was viewed as a private right. So the plaintiff or

⁷⁶ Progs of RB, 19 September 1788, BRC P/51/27, 28 November 1788, p. 533. In the same period, in the trial of one Duno Laul for forgery, the law officers of the Ghazipur adalat stated that there was no fixed punishment in Islamic or Hindu law for the crime, but he was 'worthy of the severest kind of Tazeer, that is to lose his hands or fingers'. However, they recommended confinement, 1 December 1788, in *Banaras affairs*, I, 1955, p. 110.

⁷⁷ Progs of RB, 5 April 1791, BRJ P/127/74, 15 July 1791, No. 11, pp. 377–9, 411.

⁷⁸ Ibid., p. 368. The law officers of the Banaras adalat said that amputation was inappropriate to this case and cutting the nose was not permissible at all. Ibid., p. 411. In another case of homicide the law officers again rejected the complainant, Kesri Singh's demand that the nose and arm of the prisoner be cut off because he did not want to ask for the death penalty or blood-money. BCrJ P/128/13, 22 August 1794.

⁷⁹ RB to Sub-Secy, 21 January 1791, BRJ P/127/73, 29 April 1791, pp. 612–18.

⁸⁰ Ibid. Under the law regulating *kisas*, the hakim could make a claim for blood-money or death if the deceased did not have any heirs.

his heirs could forgive the offender or accept compensation. They went on to explain that

During the first beginnings of the Court all the Books were not forthcoming; wherefore Reliance was necessarily placed on the Kunz farsi.... But now thro' the divine favour and your Goodness a number of the best Arabic works of Jurisprudence have been collected. On reference to and consideration of which it has appeared, that the pardoning of the Proprietor of the Goods is in respect to the cutting off of the Limb of no avail....⁸¹

Quite apart from the formal provisions of Islamic law there was a widespread conviction in Indian society that in cases of homicide it was the family's 'satisfaction' which should take precedence over other claims. A magistrate of Bakargang noted:

It is agreeable to the Law, and a Maxim likewise among the Hindoos that, in cases of Murder, if the perpetrator can find means to satisfy the next Heir of the Murdered and obtain from him what is called a Razeenamah, no prosecution can, or ought to be carried on against him.⁸²

If the homicide had occurred within the family, the family tie usually prevailed to secure a pardon for the offender. When Rehman slew his mother, enraged that she had married off his widowed sister, this sister began pressing the court for his release, 'as she had pardoned him and was the only person possessing according to her notions of the Law a right to require his Punishment.'⁸³ This reference to the sharia was backed by other more personal arguments. Rehman's sister said she depended on him for her support, 'arguing withal that as her Brother had only killed his own mother it was thus a family matter that concerned nobody beyond its domestic sphere....'⁸⁴ When Bissehen killed his brother-in-law, his sister and her son petitioned for justice, but subsequently deposed that 'as the said Bissehen is our Brother

⁸¹ Ibid., pp. 640-1.

⁸² BRC P/52/22, 3 December 1790, p. 312.

⁸³ Extract from progs of RB, BCrJ P/128/12, 1 July 1794, No. 7, p. 520.

⁸⁴ Ibid. The law officers of the Banaras *adalet* said that Rehman should be freed. The resident eventually induced them to concede that Rehman could be punished capitally *siyasatan*, i.e. by the ruler's authority to impose an extraordinary punishment for public example. However, on a reference to Fort William, Rehman was sentenced to transportation for life. Ibid.

and uncle we therefore relinquish the prosecution against him for the Murder of Downgur our ancestor and we do forgive him.⁸⁵

But familial bonds were also invoked through an authority structure strongly marked by gender distinctions and patriarchal right. Where a woman had been killed by her husband or other male relative, the defendant's frequent justification was the allegation of some sexual or sometimes just some social irregularity. Here there was seldom anyone to claim justice on her behalf, although neighbours and relatives would sometimes testify to her good character.⁸⁶ In the next chapter I examine a certain mode of defending revenue privileges and seeking justice among Brahmin cultivators and landholders of certain parganas in Banaras Zamindari, who might put a female relative to death, publicly and dramatically, to focus attention on some act of 'oppression' and to cast infamy over their opponent. Where a father was brought to court for killing his child, he would begin his explanation with the assertion that the child was *his*, suggesting the rejection of any other claim over it.⁸⁷ In a case where a widow and her lover were sent up to the court by the *mahto* of a Kachchi community, the issue of illicit sexuality seemed to be of greater importance for the *mahto* and the Islamic law officers than the question of whether the couple had intended to kill their illegitimate child or whether it had died of exposure.⁸⁸ An interesting subject of speculation is whether abortion and infanticide were considered heinous in themselves or investigated in the community

⁸⁵ RB to GG in C, 12 May 1792, BRJ P/127/79, 25 May 1792, p. 188. The mother of the murdered man also gave up her claim to *kisas* or *diya*.

⁸⁶ The Islamic law officers told Duncan that the deceased woman's neighbours should be examined about her character, to check if the husband's allegations had some foundation. Cf. RB to GG in C, 18 December 1789, BRC P/51/53, 30 December 1789. I have come across one case in the Duncan records in which a woman's relations petitioned for justice when her husband killed her. This was among a community of Doms, of whom the *amil* made the condescending comment that those of low caste had no settled place. The implication was that their normative standards were different RB to GG in C, 27 November 1794, BCrJ P/128/19, 24 March 1795.

⁸⁷ Munraje, a witness, said that when he asked Rehm Khan who he had killed, he replied that he had killed his own daughter because she thieved from other villagers. RB to GG in C, 25 May 1792, BRJ P/127/79, 1 June 1792, p. 220.

⁸⁸ RB to Sub-Secy, 26 March 1791, BRJ P/127/73, 29 April 1791, p. 599. *Mahto*: headman.

for the proof they gave of the more disgraceful offence of prohibited relationships. The readiness of various parties, neighbours, the midwife, the washerwoman, the watchman, to report some hapless woman who had killed her illegitimate child contrasts tellingly with official difficulties in getting evidence about systematic female infanticide within certain communities.⁸⁹ The latter was defended not just as a matter of parental right, but also as a matter of community custom, i.e. as a domain outside the legitimate intervention of the ruler.⁹⁰ And material on female infanticide among certain Rajput communities makes it clear that such parental right ran more strongly in the patrilineal channel.⁹¹

Outside the domain of the family, other spheres of authority influenced the terms within which heirs sought justice. Poverty, the loss of a breadwinner, or the superior power of the adversary, all shaped decisions to accept compensation instead of demanding retaliation. Interestingly, the heirs often presented their choice as one between outright pardon and compensation rather than between pardon and retaliation. One can discern a current of reluctance to take responsibility for the 'blood' of another, and a sense that to ask for another death was of no particular advantage to the family. Perhaps the belief that the death was first and foremost a matter of satisfying the heirs of the deceased was complemented by

⁸⁹ See chapter four.

⁹⁰ One Murdun Singh, summoned for murdering his infant daughter, the first such trial in the Gorakhpur district, 'in his Defence and in order to shew that the depriving of Female Infants of Life is not considered as Murder but as an Act of his the Rajpoot Cast, obtained a certificate to that Effect from the Kanoungo of the Pergunnah . . . J. Foulledge, Collr Gorakhpur to Bareilly CC, 17 April 1802, Gorakhpur Collectorate, Pre-Mutiny, Revenue letters to the Board of Commrs, vol. 112, December 1801-2, RAA. From western India, in 1807-8, Fateh Muhammed on behalf of the Rao of Kutch represented the practice as a matter of community belief and paternal right, continuing irrespective of the rise and fall of dynasties. H. Moor, *Hindu infanticide*, 1811, pp. 123-4, 139-42.

⁹¹ Though official reports stated that Rajput mothers shared in the status aspirations of the husband's lineage which structured the practice of female infanticide, they also gave instances of the pressure put on them to acquiesce. In some cases the girl-child lived because she had been born in the mother's maternal home. In the Rajput village of Burthura, the five infant girls found as against ninety infant boys had survived because they were born in the mother's family home. Circular, Commr Banaras, 10 November 1854, No. 59, Banaras, Pre-Mutiny Judicial (PMJ), Commr's Office Banaras (COB), Basta, 132, vol. 4, RAA.

the belief that the heirs would have to accept responsibility for the punitive act as well; they could not distance themselves from the death sentence.⁹² Thus the grandparents and father of a strangled boy said that since they could not recover the child, 'what good would it do to have two people [the murderers] killed.'⁹³ Instead, they conceptualized a median form of physical retaliation: a limb for a life, and the nose for perpetual disgrace.⁹⁴ The parents of Poorun, beaten to death by Ramzan, reasoned in somewhat the same way, but being poor, they accepted compensation:

Poorun is dead and cannot be recovered, if the Defendant is also killed or otherwise punished, it will be of no advantage to us. Ramzan and others with him agree to pay us forty Rupees and Nercoo curwal is the security for it. . . .⁹⁵

And the heirs of a pickle vendor, who died when a *fakir* hit him in the belly, said that by killing the slayer the deceased would not be brought back to life. Since the fakir could not pay diya, they forgave him 'for God's sake'.

The right of heirs to compensation was strongly defended by the Islamic law officers despite Duncan's pointed remarks about the 'indecent' of 'selling' a relative's blood.⁹⁶ However, some plaintiffs do seem to have thought that accepting money for the death of a relative was not quite honourable.⁹⁷ Cases of homicide in which heirs demanded retaliation with some vehemence were those with a long history of tension, for instance a feud over property, or sectarian conflict. The background to Bhiky Roy's attack on Akbar, a Muslim chandler, was tension over the building of a mosque in a Rajput-dominated street. Here the widow entered the court in *pardah* to demand kisas despite the determination of the Rajputs to

⁹² P. Spierenburg attributes the 'infamy' of the medieval executioner in Europe to the fact that for the people he symbolized the expropriation of private vengeance by territorial lords who had not wronged them personally. *The spectacle of suffering*, 1984, pp. 5, 29.

⁹³ BRJ P/127/74, 15 July 1791, No. 11, pp. 377-9, 411.

⁹⁴ Ibid. Cf. BCJ P/128/13, 22 August 1794, for another case of homicide in which the plaintiff asked for the amputation of the hand and nose of the defendant instead of kisas or diya.

⁹⁵ BCJ P/128/16, 21 November 1794.

⁹⁶ RB to Sub-Secy, 30 December 1791, BRJ P/127/77, 6 January 1792, pp. 7-17.

⁹⁷ Cf. BRJ P/127/74, 15 July 1791, No. 11, pp. 377-9.

shield the attacker.⁹⁸ In the murder of a boy, which followed a dispute between two Mahabrahmin families over claims to *birt*, the fatwa indicates that the victim's family asked for retaliation even if it meant spilling Brahmin blood.⁹⁹ Usually however the victim's family would not demand capital punishment if the offender was a Brahmin, although they might castigate him for being wicked or sinful and suggest another form of punishment, such as banishment. If a homicide took place under the allegation of an illicit relationship, a claim for justice was more likely if the deceased was the guilty man rather than the guilty woman. But in the case of Meghoo, who had killed Kungal for adultery with his wife, Kungal's mother relinquished her claim to *kisas* and *diya* because she said her son had 'got the punishment of his own actions'.¹⁰⁰

Discretionary Punishment and the Modification of Islamic Law

Duncan was given powers to remedy the 'defects' of Islamic law 'where the prescriptions would defeat the Ends of Public Justice', but punishments affecting life and limb were to be awarded only on the express sanction of Islamic law.¹⁰¹ The President began to question the law officers on discretionary punishment both under Islamic law and under Mughal traditions of rule, in those cases where *kisas* or *hadd* were barred by legal exceptions. This exploration was very important to the Company's effort to extend the punitive authority of the state. The law officers of the Nizamat Adalat responded by writing certain legal treatises on *tazir*.¹⁰² In

⁹⁸ RB to GG in C, 3 September 1794, I:CrJ P/128/14, 19 September 1794, p. 372. *Pardab*: here, the veil; also, female seclusion.

⁹⁹ I am deducing this from the fact that the law officers of both the mulki faujdari adalat and of the Banaras Adalat said that the prisoner Bhowani Baksh was liable to *kisas*. This would not have been the case if the heirs had accepted blood-money or pardoned him. RB to GG in C, 22 October 1788, BRC P/51/27, 1 December 1788, pp. 651-67. In another case Kesri Singh asked that the nose and arm of the offender, Patty Rani, be cut off, even though both he and the defendant were Brahmins. B:CrJ P/128/13, 22 August 1794. *Birt*: customary perquisites.

¹⁰⁰ RB to GG in C, 2 February 1792, BR P/127/77, 17 February 1792, pp. 202-27.

¹⁰¹ Cf. RB to GG in C, 28 October 1788, BRC P/51/27, 28 November 1788, pp. 493-4, 504-5.

¹⁰² *Tazir*: discretionary punishment intended to reform the offender.

the more narrow interpretation of *tazir*, its infliction was restricted to those crimes for which no specific penalty was fixed in the sharia. In the more expansive interpretation, *tazir* could be inflicted in all cases where some legal doubt or impediment barred the penalties of *kisas* or *hadd*.¹⁰³ Harington cites this more expansive exposition of *tazir* as expounded by Kazi Nujm-oo-Deen, the *kazi-ul-kazaat* of the Nizamat Adalat and by Maulvi Muhammed Rashid. He also quotes a fatwa given by the law officers of the Nizamat Adalat in 1794 in which they explained that though individual right was predominant in *kisas*,

yet the right of God likewise attaches, for the preservation of the lives of mankind . . . where *Kisas* is prevented by any circumstances of exemption, if the magistrate . . . judge it expedient, he may enforce the public right, by inflicting *Tazeer*, less than the specific penalty fixed by the law.¹⁰⁴

But this fatwa also made it clear that if the heirs pardoned the offender or accepted blood-money, the judge could not impose the death penalty, though he could inflict some lesser punishment. And again, where legal conditions for the *hadd* penalty were not satisfied, the discretionary punishment could not approximate in severity to it. In Islamic tradition the ruler could inflict death where it was absolutely necessary for the sake of public example, i.e. *siyasatan*. But this was supposed to be an occasional infliction, not a regular practice. Maulvi Muhammed Rashid's treatise on *tazir*, which Harington cites, makes this very clear:

Seeasut . . . is manifestly intended to be occasionally inflicted by the Imam . . . not to be constantly adjudged. This is inferable from the special nature of Seeasut, applicable to particular cases; *not being founded on any express authority from the law giver, to enforce it, at all times, without necessity, would be objectionable*.¹⁰⁵

¹⁰³ It is clear that the Naib Nazim of Bengal imprisoned offenders in cases where the *hadd* penalty was barred by some legal exception. But it is not clear whether he also exercised this discretion in cases relating to *kisas*. Letter from Muhammad Reza Khan, received 26 April 1791, BRJ P/127/73, 6 May 1791, No. 4. In the seventeenth century John Marshall mentioned the ruler's recourse to *torna*, breaking, that is punishing someone if satisfied about his guilt, even if by sharia law there were not sufficient witnesses, S.A. Khan (ed.), *John Marshall in India*, 1927, pp. 391-2.

¹⁰⁴ *Elementary analysis*, I, p. 292. *Kazi-ul-kazaat*: here, chief kazi of the superior court of the Presidency.

¹⁰⁵ *Ibid.*, pp. 290-1, emphasis added.

Duncan had asked the law officers, in a very pointed manner, whether capital punishment could be awarded, 'consistently with the practice of the emperors of the race of Timur' even in cases where the relatives forgave the murderer.¹⁰⁶ The judge-magistrates, with the exception of Amanullah of the Ghazipur court, stated that they had found no such instance.¹⁰⁷ The latter strove to provide the widest interpretation of discretionary powers to inflict the death penalty. If the offender made a regular practice of strangling or drowning people, then even though *kisas* was barred (because no blood had been spilt), capital sentence could be awarded 'as a discipline and a terror to others'.¹⁰⁸ He also gave two instances in which a Sultan of Gujarat had put offenders to death, but these clearly illustrated *siyasa* (extraordinary punishment outside the framework of the sharia), rather than a modification of the law of *kisas*.¹⁰⁹ The law officers of the *adalats* sometimes suggested discretionary punishment for an offender who had escaped capital punishment, for the 'violence' of the act,¹¹⁰ or the 'disturbance' he had caused, or for his reformation.¹¹¹ But they did not accept that this discretionary punishment could extend to capital sentence. They also defended the right of the heirs to compensation in cases of homicide, in one case rejecting the resident's argument that a claim to blood money could be commuted to a sentence of transportation. Duncan had tried to persuade a father to give up *diya* for the murder of his son, remonstrating with him on the 'Indecency of his wishing

¹⁰⁶ RB to GG in C, 18 December 1789, BRC P/51/53, 30 December 1789, pp. 541-600.

¹⁰⁷ 'The Emperors of the Timurian Dynasty were Professors of the Holy Faith and the apostolic Law; and they regulated their Practice thereby', wrote mufti Karim-ullah, the judge-magistrate of Jaunpur. Lala Buksh Singh of the Mirzapur court reported that it was improper to award the death penalty, where the heirs forgave the offender, and that the 'administration of the dynasty of Timur were not contrary to the shera'. Ibid.

¹⁰⁸ Reply of Aman-ullah, *ibid.*, pp. 549-92.

¹⁰⁹ Ibid.

¹¹⁰ Cf. case of Dhunoo Chamar, who had killed his daughter. The *farwa* of the mulki faujdari *adalat* said *kisas* was barred 'on account of the respect and Authority due to the paternal Character' but he should be punished by *tazir* 'on account of the violent Act'. BCrJ P/128/14, 26 September 1794, pp. 932-3.

¹¹¹ When Cheidy's mother pardoned his killer, Kundiya, the Banaras *adalat* stated that as Kundiya was a quarrelsome person he should be confined till he showed signs of repentance. RB to GG in C, 15 June 1789, BRC P/51/39, 1 July 1789, p. 592.

(contrary to the first Idea he expressed ... Market or Advantage of his Son's Blood'.¹¹² But the mulki *adalat* stated that it was not permissible to deprive the heir of *diya*. And the Banaras *adalat* declared that even if the heir gave up his claim to blood money, it could not be used to sentence the prisoner to transportation instead:

The learned of my Court have said that to excuse or take the Deceit does depend on the pleasure of the heirs. But this pleasure of theirs has no concern with sending the slayer any where else, or with banishing him, because exclusively of the exaction of Deceit the heirs have legally no other claim on the slayer. To send him to Pulo Penang is not according to the Shera or law.¹¹³

What the Company eventually did to expand its powers of punishment, explains Jorg Fisch, was to narrow down the difference between *tazir* and *siyasa*, and to incorporate *siyasa*, extraordinary justice, to ordinary justice.¹¹⁴

Criminal Intention and the Legal Claims of the State

It was probably Duncan who provided Cornwallis with the proposition that capital punishment for wilful murder could be extended by favouring the legal school of Abu Yusuf and Imam Muhammed over that of Abu Hanifa.¹¹⁵ The resident had reported that by Hanafi law, deemed the more orthodox, only a homicide performed in a particular manner drew the penalty of death.¹¹⁶ But by the

¹¹² RB to Sub-Secy, 30 December 1791, BRJ P/127/77, 6 January 1792, p. 16.

¹¹³ Ibid., p. 13. Again, Ali Ibrahim Khan said the hakim could exact *kisas* or *diya* for the slaying of Munsa who had no heirs to claim justice, but not transportation, 'because such a *rowayet*, or legal opinion has not been found in the Books'. Ali Ibrahim Khan to RB, 30 January 1792, in RB to Sub-Secy, 1 February 1792, BRJ P/127/77, 10 February 1792, pp. 152-4.

¹¹⁴ *Cheap lives*, pp. 66-7.

¹¹⁵ In 1790 Cornwallis introduced a regulation that in cases of homicide the opinion of Yusuf and Muhammad was to be invariably applied. He cited his correspondence with Duncan to argue that the Muslim government had occasionally used this doctrine. BRC P/52/22, 3 December 1790, p. 219.

¹¹⁶ According to the school of Abu Hanifa *kisas* could be awarded only if the instrument of death was one usually associated with the shedding of blood. In his 'Abstract' of Hamilton's translation of the *Hidaya*, Vans Kennedy explained that this distinction sprang from the idea that as the intention was concealed, it could be known only by a visible act. If therefore someone ha

former, 'admitted to be law . . . tho' not held in high esteem', the method was interpreted more flexibly to assess criminal intention.¹¹⁷ Duncan began to intervene to demand a broader investigation of criminal intent as the criterion for final sentence. The degree of premeditation being an important index of intention, he expressed his dissatisfaction with insufficient information on this point. In the trial of Sheopershaud, who had killed Dylloo Singh with a *peshkabz* in a heated dispute, the law officers of Banaras adalat said he was liable to *kisas*.¹¹⁸ Duncan said the adalat had not 'thoroughly ascertained the intention of the party just before he struck the blow'.¹¹⁹ Should such an unpremeditated act be punished with the same severity as murder with malice a forethought?¹²⁰ Despite a second reference, the law officers adhered to their decision.¹²¹ According to their reasoning, Sheopershaud had confessed to striking the victim with an iron instrument, and all the heirs had asked for *kisas*, so further examination would not alter the fatwa. In other words, the absence of premeditation would not affect the right of the heirs to claim retaliation.¹²² In the trial of Bhyro, who had killed Mya with a sword during an affray, Duncan said the court had not enquired sufficiently into the degree of provocation, for 'killing with a Bad design, a fixed intention, and from revenge' had to be distinguished from homicide in an unexpected broil.¹²³

used an instrument of murder against another it must have been with the intention of murder. Vans Kennedy, 'Abstract of Muhammedan law', *JRAS*, 1835, pp. 142-3. However, Fisch argues that it was the issue of causality which underlay the distinction, i.e. did the nature of the weapon introduce some doubt about the real cause of death. *Cheap lives*, p. 28.

¹¹⁷ RB to GG in C, 10 November 1788, BRC P/51/27, 28 November 1788, pp. 509-10.

¹¹⁸ If the instrument was made of iron, as for instance, a sword, a metal tipped staff, or this *peshkabz* (an iron tool), then the heirs could, by Hanafi law, claim *kisas*.

¹¹⁹ RB to GG in C, 5 March 1792, BRJ P/127/77, 23 March 1792, p. 473.

¹²⁰ In an earlier case the resident had reduced a term of imprisonment on the grounds that the prisoner had not intended to murder the deceased, only to frighten him. BRJ P/127/71, 21 January 1791, pp. 733-4.

¹²¹ RB to GG in C, 5 March 1792, BRJ P/127/77, 23 March 1792, pp. 474-5.

¹²² *Ibid.*, pp. 487-511. The Board said the matter should rest for consideration. I have not found any further reference to the case.

¹²³ RB to GG in C, 3 July 1791, BRJ P/127/74, 15 July 1791, Nos 5-6, pp. 213-78. In this case the law officers explained that if the victim had been killed after he had turned his back on the fight and tried to escape, then his slayer was liable to retaliation.

For the law officers the point at issue was whether it was proved that the prisoner had committed the homicide, and with an instrument which, under Hanafi law made him liable to *kisas*. Thereafter, the heirs were entitled to *kisas* or *diya*, irrespective of whether the murder was committed in sudden heat, under great provocation, or with deliberate premeditation.¹²⁴ Nor did a plea of intoxication lessen the offender's liability to *kisas*,¹²⁵ whereas in England, intoxication could be considered a factor diminishing reason and therefore serve as a plea for mitigating punishment.¹²⁶ Drunkenness itself was an offence in Islamic law. Bhiky Roy's relatives said he had attacked Akbar, a Muslim chandler, in a delirium brought on by a potion. The law officers of the Banaras adalat pointed out that Bhiky had had sufficient sense to run away, and even if he was intoxicated, he was still liable to *kisas*. But the resident felt Bhiky Roy may have been *non compos*, so capital sentence was commuted to life transportation.¹²⁷ In the case of Lotoo Dom who had killed his wife, alleging adultery, the law officers did not examine the allegation, stating merely that since the heirs did not demand *kisas* or *diya*, the hakim could, if he chose, inflict some discretionary punishment. The resident expressed his dissatisfaction with the investigation, especially as to the charge of adultery, 'which is a most material Circumstance in the Estimation of the Prisoner's Criminality or Innocence'.¹²⁸ But the judge explained that only if the heirs had demanded *kisas* would it have been necessary to examine Lotoo's story about a 'lawful' chastisement for adultery.¹²⁹

The greater importance given by Company officials to intention and pre-meditation extended the punitive claims of the state at the expense of the restitutive claims of the victim or his heirs. By the same criterion the practice by which people who could not

¹²⁴ Cf. also *Cheap lives*, p. 28.

¹²⁵ W.H. Macnaghten, *Reports of cases determined in the Nizam Adalat* (henceforth *NAR* for this series), 1, 1801-19, Calcutta, 1827, p. 247.

¹²⁶ *NAR*, 1, p. 247.

¹²⁷ RB to GG in C, 3 September 1794, BCJ P/128/14, 19 September 1794. In the Company's courts intoxication was given some consideration in assessing motive and intention. Law reports, Lower Provinces, 1853, part 2, p. 98, cited in F.L. Beaufort, *A digest of criminal law*, part 1, 1857, pp. 38-9.

¹²⁸ RB to GG in C, 27 November 1794, BCJ P/128/19, 24 March 1795, pp. 368-95.

¹²⁹ *Ibid.*

pay diya, were imprisoned for indefinite periods, was also found objectionable and modified.¹³⁰ In 1793 a regulation for the Bengal Presidency imposed capital punishment for wilful murder, even if the heirs of the deceased had extended a pardon or accepted compensation.¹³¹ In cases of theft, Duncan had given sentences of imprisonment even where the offender offered to make restitution.¹³² In 1797 a composition, that is a compromise, or the substitution of one penalty for another, was prohibited in all serious crimes.¹³³ So there was little incentive now for the thief brought to court to offer to make up the loss. This also discouraged victims of theft or robbery from bringing their suspect to trial if they had any hope of persuading or coercing him to repay.¹³⁴ These changes in procedure and in the judicial reasoning by which sentences were formulated also changed the expectations with which a prisoner made a confession in court.

Rules of Evidence: The Confession

In Islamic law the confession of the accused carries great weight, because the alternative is proof by exacting standards of eyewitness

¹³⁰ Hastings said that such indefinite imprisonment 'must deprive the state of his services and prove a heavier punishment than the law has decreed him'. Letter from WH, 10 July 1773, in *Supplement*, pp. 114-19. Reg 14 of 1797 prohibited the payment of damages or fines to individuals in the criminal courts. The Nizamat Adalat could release those imprisoned for inability to pay diya. Cf. Beaufort, *Digest*, pp. 27-8 for the Islamic law on liability in cases of accidental homicide.

¹³¹ The Bengal regulations were extended to the Banaras Zamindari when it was incorporated into the Presidency in 1795.

¹³² Cf. the case of Busteya, who secured a razinamah from the plaintiff by engaging to restore the value of a stolen bracelet. The law officers said he should be given some discretionary punishment; Duncan awarded seven years transportation! RB to GG in C, 24 August 1794, BCrJ 19 September 1794, No. 3, pp. 337-9, WBSA. See below for the case of Manorat Ahir.

¹³³ Reg 9, s 8, 1807 prohibited the acceptance of a razinamah in heinous crimes. Cf. also *NAR*, I, p. 180.

¹³⁴ In 1815 the Allahabad Magistrate argued that under the former Government stolen property was almost always recovered. The offender would acknowledge the act, engage to pay, or give a bond, and liquidate the sum even if he did not acknowledge the theft. But he would refuse to divulge what he had done with the property or the names of his accomplices. He stated that unknown to the Magistrate this arrangement still took place frequently. Home Misc 776, pp. 818-19.

evidence.¹³⁵ By the laws of the sharia this confession should be voluntary, but the degree to which this is respected depends of course upon the norms of culture and authority shaping trial and punishment.¹³⁶ An enquiry which Duncan made into the beating of two prisoners suggests that the use of coercion to extract confessions was quite common. Ali Ibrahim Khan explained that in their written declaration the prisoners had admitted to murdering two people. But they had differed in their subsequent statements and refused to reveal the manner in which they had committed the murders. 'In such a case where there is neither prosecution nor witness it is agreeable to the Mahomedan Law and custom, that the Hakim should, to learn the Truth, threaten and even chastise people who are taken upon suspicion.'¹³⁷ Here Ali Ibrahim's justification for coercion was the need to get a confession given the lack of other sources of evidence. In other cases the offender made his confession on the basis of some sort of understanding with the plaintiff. The plaintiff would promise to intercede for leniency if the accused made up the value of the stolen

¹³⁵ Beaufort, *Digest*, p. 126. Cf. Vakil of Govt vs Tuhowar Khan in *NAR*, vol. 1, pp. 239-40. In cases relating to kisas the retraction of an earlier confession did not absolve the prisoner. But in offences tried by hadd laws the retraction of confession barred the prescribed penalty.

¹³⁶ Of the Ottoman empire between the fifteenth and eighteenth centuries, Uriel Heyd writes that though the sharia did not recognize confessions obtained by force or threats, yet torture was widely used in penal justice under the term *orj*, or common usage. However torture was supposed to be applied only where there was strong circumstantial evidence or where the prisoner had a criminal record. U. Heyd, *Studies in old Ottoman criminal law*, 1973, pp. 252-3. Cf. also J.H. Langbein, *Torture and the law of proof*, 1977, for an account of torture as a formal part of the judicial process, as distinguished from torture as punishment.

¹³⁷ Ali Ibrahim Khan to RB, 9 October 1792, DR Basta 11, No. 63, October 1792, RAA. The situation was one in which Ali Ibrahim, as hakim, had undertaken to claim retaliation on behalf of the heirs. He probably wanted a clear confession. Ibid. Thevenot reported that in Surat the kotwal would investigate a theft by beating all the people of that house, but if after 5-6 days the suspect did not confess he would be let off. S.N. Sen (ed.), *Indian travels of Thevenot and Careri*, 1949, p. 28. In this case coercion seems to assume the form of a trial by ordeal. The suspect might himself volunteer a trial by ordeal, using some form of a corporal test, to vindicate his innocence. Dhunoo Chamar, tortured to confess to a robbery, had volunteered to take the ordeal oaths of hot iron or boiling oil to exculpate himself. BCrJ P/128/19, 6 March 1795, pp. 22-40.

goods. The two would then hand in a razinamah about the terms of restitution. The importance of the hakim's intervention in this transaction should not be underrated. His authority was crucial to forging the compromise, and the confession was a gesture of submission to him as the source of order and justice. But it was also understood that the offender who confessed could expect more lenient treatment than one whose guilt had to be proved through other means.¹³⁸ When Manorat, an Ahir, was brought to trial for the theft of two buffaloes, he confessed, and began to outline his arrangements for compensating the plaintiff, a zamindar of his village. Both he and the plaintiff seemed to expect that that would conclude the issue.¹³⁹

As the scale tipped in favour of a fixed measure of punishment, the element of composition between victim and offender lost its significance in the trial procedure. Of course informal deals were still made between the plaintiff and the offender, with the darogha often supplying the element of threat or coercion which underwrote the arrangement. But such arrangements were conducted outside the court, and often in contravention of the law regulating police procedure.¹⁴⁰ The darogha was in fact positively prohibited by a regulation of 1810 from holding out hopes of pardon or remittance of punishment to encourage prisoners to confess.¹⁴¹ The magistrate could offer a pardon in return for a full disclosure about accomplices, but only for 'heinous crimes' and not to the 'principal offenders'.¹⁴² On the one hand, this shift discouraged confessions: officials complained that offenders who confessed on first apprehension learnt in jail that they must deny their confession when

¹³⁸ Arthur Steele, instructed by Elphinstone to record the law actually in practice among the Hindus, observed that confession was encouraged by showing less severity to those who pleaded guilty. A. Steele, *The law and custom of the Hindu castes*, 1827, new edition, 1868, p. 152. Campbell noted that in Indian states the prisoner who confessed was supposed to be treated more favourably than one who denied his crime. G. Campbell, *Modern India*, 1852, p. 482. Cf. also J.D.M. Derret, *Religion, law and the state in India*, 1968, p. 213.

¹³⁹ RB to Sub-Secy, 21 January 1791, BRJ P/127/73, 29 April 1791.

¹⁴⁰ Police officers were not supposed to accept a razinamah except in petty cases. Reg 9, 1807.

¹⁴¹ Cf. Reg 14, s 5, cl 3, 1810. It was a prohibition repeatedly violated; Cf. CONA, 13 November 1816, p. 59.

¹⁴² Cf. Reg 6, s 3-4, 1796; Reg 10, s 3, 1824; Reg 1, s 7, 1829.

produced before the magistrate.¹⁴³ On the other hand, British officials found that the alternative procedure of conviction by eyewitness evidence was very exacting. One way around this would have been to openly accept the use of coercion to extract a confession where there were strong grounds for suspicion. But there was a reluctance to admit this in formal terms because judicial torture had long been extinct in England.¹⁴⁴

Coercive dealings with the poor and the lower orders of society were a part of the everyday practices of rent and revenue realization in eighteenth century India.¹⁴⁵ As procedures for bringing land to sale for revenue arrears stabilized, these practices may have declined for the upper strata of agrarian society, particularly in areas where the real burden of revenue demand decreased as a proportion of the agrarian surplus. The use of physical violence and coercion to collect rent or revenue from the more defenceless sections of agrarian society, who could not count on a fixed demand, and whose landholdings were more precarious and less saleable, probably continued.¹⁴⁶ However, the expansion of the claims of the state, through the sphere defined as criminal justice, certainly exposed the lowlier sections of society to physical coercion from a new agency, the colonial police.¹⁴⁷ The magistrate

¹⁴³ Cf. Judge-Magt Jaunpur, 15 August 1815, Home Misc, 776. This accounts for the anxiety of magistrates to keep prisoners under trial separate from convicted prisoners.

¹⁴⁴ J.H. Langbein argues that there was no judicial torture in England because here the trial by ordeal had been replaced by the jury system, not by the Roman canon law of proof. An English jury could convict on mere circumstantial evidence. But in Europe, the law of torture survived because the standards of proof made the judicial system absolutely dependent on coerced confessions till the eighteenth century. *Torture and the law of proof*, pp. 9, 47-8. Cornwallis' judicial regulation of 3 December 1790 asked judges to receive the prisoner's confession with 'circumspection and tenderness'. Reg 9, s 6, 1793, instructed magistrates to take care that persons apprehended were not subjected to corporal punishment 'under the pretence of compelling them to answer truly to questions . . . put to them . . .'.

¹⁴⁵ Cf. J.R. McLane, *Land and local kingship in eighteenth century Bengal*, 1993, pp. 69-95 for changes in the form of sanctioned violence in the 1790s.

¹⁴⁶ Cf. for instance *Report of the commissioners for the investigation of alleged cases of torture in the Madras Presidency*, part 1, 1855.

¹⁴⁷ Cf. T.H. Ernst, Circuit Judge at Patna to Register NA, 27 July 1811, pointing out that 'the grand engine' for convicting suspects was the threat of torture to their female relations. Yet he admitted that there would be few convictions without such mufassil confessions, especially in cases of dacoity. Papers of Edward Strachey, Mss Eur F 128, IOL.

either actively supported this informal procedure for getting confessions, or turned a blind eye to it, because the effectiveness of policing was often deduced from the percentage of convictions to acquittals. At the same time, the difficulty of getting witnesses, or often even the victims of a crime to testify in court, meant that the confession was often one of the main planks for prosecution, despite periodic anxiety at Fort William about the methods used to extort it.¹⁴⁸

The modification of certain procedures of Islamic law also enhanced the importance of securing a confession to convict the prisoner. Earlier, as pointed out, if the evidence was not enough for one of the fixed penalties of hadd or kisas, then a lesser punishment could be awarded, according to the degree of guilt which had been established.¹⁴⁹ But this degree of judicial discretion could not be formally accepted within a more bureaucratic order of justice. Instead of scaling the severity of punishment to the degree of proven guilt, i.e. to the amount of evidence available, the judges were supposed to strive towards a clear-cut verdict of guilty or not guilty.¹⁵⁰ Regulation 53 of 1805 explicitly declared that an offender could only be punished on a verdict of guilty, not according to the degree of suspicion of guilt.¹⁵¹ Because of the insistence on a sharper distinction between the state of guilty or not guilty, confession became all the more necessary to convict the prisoner.

The act of confession was therefore gradually situated within a different order of judicial reasoning. For those offenders who had

¹⁴⁸ CONA to Courts of Circuit, No. 73, 23 August 1810, and 4 January 1811, No. 78, pp. 24-9. Cf. 'Administration of criminal justice in Bengal' for criticism of the reliance on confessions to convict prisoners, *Calcutta Review*, vi, xi (July-December 1846), pp. 135-89.

¹⁴⁹ *Cheap lives*, p. 68.

¹⁵⁰ Ibid. However, in practice, the amount of evidence could still influence the sentence, as in prompting the judges to choose a life sentence rather than the death penalty. And, as I pointed out in the preceding chapter, the practice of demanding security for future good behaviour, and confining the prisoner for inability to pay, came to constitute a form of punishment in cases in which guilt could not be conclusively proved. Cf. Lord Moira's judicial minute of 2 October 1815, PP 1819, vol. 13, p. 152.

¹⁵¹ Where the Islamic law officers held there was a 'strong presumption of guilt, the same punishment was to be given as if full liability had been established. But where suspicion was of a lesser order of certainty, the prisoner was to be released.

not had the opportunity to familiarize themselves with the bureaucratization of the hakim's persona, the consequences could be quite drastic. Unfamiliarity with the changed context of the hakim's authority may explain some peculiar features of the depositions of certain petty thieves in Banaras city who were tried before Duncan in 1794-5. The judgement in these cases also gives us a significant insight into the way in which colonial criminal justice drew upon elite norms about the poor and lowly, but integrated them to somewhat different conceptions about the right order of society.

Criminal Justice and the Recurrent Petty Offender

In early 1794, after the demise of Ali Ibrahim Khan, the kotwal of Banaras had been ordered to report directly to the resident instead of to the judge of the adalat. Perhaps it was the kotwal's eagerness to display his vigilance which swept a number of petty thieves into court. Duncan reported with satisfaction that a greater proportion of 'those who live by theft' had been delivered up in the last fifteen months than in any former period of the same extent.¹⁵² The flow of pilgrim traffic in the city offered a fair field for petty larceny. The indigenous term, *uchchakagiri*, suggests a belief that there were people who made a regular practice of it. The remarkable feature of the examination of these suspects was the apparent readiness with which they gave details of past punishment for similar crimes and acknowledged their 'evil disposition'.

One explanation might lie in the fact that most of these prisoners seemed to be well known to the officers of the kotwali and the adalat.¹⁵³ Such men would be particularly vulnerable to any law-and-order drive launched in the city. However, there was no authoritative record which could have proved that string of petty offences which they reeled off in court. The other interesting feature of their confessions is that they made no attempt to seek the indulgence of the court by pleading poverty, though some of them clearly took to petty theft as they might have taken to begging, domestic service, or similar means to

¹⁵² BCrJ P/128/21, 10 July 1795, p. 683. *Uchchakagiri*: petty stealing, pickpocketing, shoplifting etc.

¹⁵³ Cf. trials of Gholam Hosayn and Narrun, RB to GG in C, 25 July 1794, BCrJ 29 August 1794, No. 6, pp. 240, 244, WBSA.

sustain their precarious existence in the city.¹⁵⁴ On being asked why they returned to theft despite having given *muchalkas* (undertakings) of future good conduct or to leave the city, their response was only to admit they had been at fault, or to acknowledge helplessness before their own 'disposition'. 'I cannot conquer my evil disposition', said Sheona, when asked why he did not give up uchchakagiri, 'or resist the temptation when it presents itself.'¹⁵⁵ 'When I get released from the Adalat', said Deena, 'my mind is never at ease without recurring to the Trade of thieving — I am therefore helpless.'¹⁵⁶ Kunooa declared that he stole because of his bad disposition, 'I am helpless'.¹⁵⁷ Lutchmaneah, a woman apprehended for theft, said she could not recall exactly how many times she had been apprehended for theft but that it must have been 'about twenty Times. . . I cannot give over Stealing, and I cannot rest without Stealing — I am helpless.'¹⁵⁸ Assault alone referred to hardship. Asked to return the stolen money, he pointed out, 'If I were not entirely indigent why should I commit theft.'¹⁵⁹ The details which these prisoners gave about past offences and the terms in which they described their dispositions were interpreted by Duncan as proof that they were thieves 'by profession and may be considered as being from long habit irreclaimable.'¹⁶⁰ It was on this reasoning that such 'petty but obdurate thieves' were for the first time awarded sentences of transportation, ranging from three to seven years; in fact Duncan recommended transportation for life for Lutchmaneah.¹⁶¹

¹⁵⁴ Cf. depositions of Mulloo and Budloo, BCrJ P/128/15, 17 October 1794, p. 182. Busteya said he would return to his home in Patna and become a servant. RB to GG in C, 24 August 1794, BCrJ 19 September 1794, No. 3, pp. 337-49, WBSA.

¹⁵⁵ RB to GG in C, 24 May 1794, BCrJ P/128/12, 6 June 1794, p. 20.

¹⁵⁶ RB to GG in C, 17 June 1794, BCrJ P/128/12, 4 July 1794, p. 370.

¹⁵⁷ Translation of a trial in the Banaras city court, BCrJ P/128/22, 17 July 1795, No. 2, p. 6.

¹⁵⁸ RB to GG in C, 26 August 1794, BCrJ P/128/14, 19 September 1794, pp. 328-33.

¹⁵⁹ RB to GG in C, 24 May 1794, BCrJ P/128/12, 6 June 1794, p. 39.

¹⁶⁰ Ibid. p. 3.

¹⁶¹ In the case of Lutchmaneah for instance the law officers had ruled that 'as the prisoner does not give over stealing she is liable to imprisonment or banishment from the City or District.' The resident recommended that she be transported for life. However the Governor General ordered life imprisonment as transportation had not yet been extended to women. RB to GG in

Hitherto the punishment which such offenders had received from the Banaras adalat had been of the order of whipping, fines and short terms of imprisonment, followed by banishment from the city or an undertaking for future good conduct.¹⁶² In Islamic law, theft of an order which brought it under hadd penalties could be punished by the amputation of a limb. But the standards of evidence for a hadd penalty were so exacting that the judge would usually give a lesser punishment upon his own discretion.¹⁶³

Why had these prisoners been so forthcoming about past convictions and described a disposition which led Duncan to conclude that they were 'irreclaimable'? I would speculate that they were proffering a model of submissive behaviour which they hoped might encourage leniency. Perhaps the elites to whom they addressed themselves in the past had been of the view that the poor would not only always persist, but would also constantly reveal their predilection for such lowly forms of wickedness, and that provided they were tractable this constituted no serious threat. Now Duncan justified the extraordinary severity of his sentences with the argument that it would check 'annoyance, Banaras being a city 'long infested with thieves and pickpockets'.¹⁶⁴ Leniency, he declared, had caused injury to 'the peaceably

C, 26 August 1794, and orders of GG in C, BCrJ P/128/14, 19 September 1794, pp. 328-34.

¹⁶² Narrun, who admitted to past convictions drawing corporal punishment varying from ten to thirty strokes of the rattan, was sentenced to five years transportation by Duncan. Lutchmaneah who said she had received thirty stripes before, was recommended to transportation for life. RB to GG in C, 25 July 1794, BCrJ 29 August 1794, No. 6, pp. 240-64, WBSA; RB to GG in C, 26 August 1794, BCrJ, 12 September 1794, p. 347.

¹⁶³ Typical sentences in such cases would be tazir 'by confinement, or by beating, or by expelling from the *bald*, i.e. the City or District. . . ' Cf. fatwa of Banaras adalat in trial of Mahomed Ali for theft. RB to GG in C, 17 July 1794, BCrJ P/128/13, 1 August 1794, No. 4. The Naib Nazim of Bengal said a person habituated to petty theft could be sentenced to 'confinement during pleasure' i.e. at the discretion of the judge. Letter from Muhammed Reza Khan, received 26 April 1791, BRJ P/127/73, 6 May 1791, No. 4. However, in the more informal punitive practises of indigenous rulers, and of Islamic judges when procedures were more discretionary, the persistent thief could have his nose cut off or his ears nicked, both to punish him and to mark him out. Cf. statements of Mulloo and Budloo, RB to Sub-Secy, 27 September 1794, BCrJ P/128/15, 17 October 1794, pp. 181-2.

¹⁶⁴ RB to GG in C, 24 May 1794, BCrJ P/128/12, 6 June 1794, p. 3.

disposed and honest and industrious part of the Inhabitants of the City of Banaras.¹⁶⁵ Here we have an affirmation perhaps of the ideology of Permanent Settlement, introduced to the revenue arrangements of Bengal in 1793 and extended to the Banaras Zamindari in 1795.¹⁶⁶ Security for agricultural property would encourage landlords to invest in their land, grow higher value crops and add to their stock of labour. But Duncan's sentences also indicated that the potentially industrious sections of society would have to be liberated from sections thought to be parasitic on them. This sensibility also shaped official attitudes towards mendicancy, and criticisms of 'indiscriminate' charity in India which seemed to erode the moral ideal of industry.¹⁶⁷ Duncan, for instance, abolished *rozina*, a collection made at the Ghazipur customs house and ferry for religious mendicants. This brought a crowd of Atits, Bairagis, and Fakirs protesting to the adalat. But the resident insisted that 'the Magistrate must first protect the Rights of the Ryots and not from their oppression protect the lazy and indolent Fukeers.'¹⁶⁸

British officials expressed a repugnance for the punishment of mutilation, not only for its barbarity but also because they said it permanently consigned the offender to crime for a livelihood. But a grim argument could be made: that mutilation would incapacitate a person for certain crimes. The more obvious option

¹⁶⁵ Extract from progs of RB, 1 April 1794, BCrJ P/128/12, 6 June 1794, No. 2, p. 8.

¹⁶⁶ Cf. Ranajit Guha's illuminating survey of the idea of a revenue demand fixed in perpetuity as it was relayed from a mercantilist position in the 1770s to a free-trade one in the 1790s. *A rule of property*, 1963.

¹⁶⁷ Cf. R. Heber, *Narrative of a journey: 1824-25*, vol. 1, 1843, for a reference to 'profuse and indiscriminate charity'.

¹⁶⁸ Judge-Magt Ghazipur to RB and RB's reply, 11 April 1788, Resident's progs, Basta 20, register 5, April 1788, RAA. Significantly, the Brahmins, Atits, and Bairagis asserted that this levy was theirs by right, it was not the property of the Company. Ibid. In Banaras Duncan ordered Ali Ibrahim Khan to expel those 'sundry faukeers and Berahees [bairagis]' who persisted in collecting a percentage called *jherree* on the grain weighed in the market. RB to Ali Ibrahim Khan (nd, probably 18 December 1788), BRC P/51/32, 4 February 1789, pp. 291-4. The Bengal regulation of 11 June 1790, reserving to government the right to collect sayer, carefully stated that in contrast to the claims of landholders, the case of those distressed by the loss of income from duties was 'a separate connection, unconnected with the question of right.' *Supplement*, p. 287, emphasis added.

for future livelihood, and probably one taken by many so punished, was begging.¹⁶⁹ One reason for rejecting this form of punishment therefore was that it seemed to place another burden on the industrious.¹⁷⁰ This attitude of censure towards mendicancy was at odds with the norms by which Indian rulers or governors found a place of honour in Persian chronicles. Gholam Hazrat, for instance, in praising Khaja Eyn-ood-deen Khan, an amil of neighbouring Gorakhpur, wrote that he had 'distinguished himself in acts of charity, justice and bravery. He always had a crowd of Fuqueers around him to be fed from his income . . .'¹⁷¹ In contrast, Duncan had threatened to expel fakirs and bairagees from Banaras if they continued to claim a collection called *jherree* from the grain market.¹⁷² Subsequently, a regulation of 1795 would also make it an offence to sit on *dharna*, for 'extorting some charitable donation'.¹⁷³ By and large, however, the colonial stance on policing mendicants remained cautious in the early decades of rule, because of the religious veneration which ascetics commanded.

¹⁶⁹ In 1802, assessing penal changes under Company rule, the judge of Tipperah said he thought amputation used to increase the 'nuisance and oppression' of beggars in the street. Answer to interrogatories of the GG in C, PP, 1812-13, vol. 9, p. 125. Cf. C.R. Francis, *Sketches of native life*, 1848, referring to a man whose limbs had been amputated by the Marathas for spying, and who now stumped about as a beggar, and T. Pennant, *The view of Hindoostan*, 1, 1848, p. 66. Also, inferentially from an eighteenth-century reference in *History of the Telugu christians*, 1910, p. 278.

¹⁷⁰ 'Mutilation', wrote Hastings, ' . . . though it may yet deter others, yet renders the criminal a burthen to the public, and imposes on him the necessity of persevering in the crimes which it was meant to repress.' Letter from W11, 10 July 1773, in *Supplement*, pp. 114-16 (emphasis added). Ironically the alternative which Hastings was proposing was enslavement and transportation. Ibid.

¹⁷¹ Mufti Ghulam Hazrat, '*Kawa-ij-i-zilla-Gorakhpur*', 1810, Persian Ms No. 4540, (English trans.); *History of Goruckpore*, E.A. Reade Mss. 418, p. 20, IOL. The *Ain-i-Akbari* instructed the kotwal to put the idle to some craft but also warned him not to 'molest recluse worshippers or persecute bare-footed wandering anchorites.'

¹⁷² RB to Ibrahim Ali Khan, 18 December 1788, BRC P/51/32, 4 February 1789, p. 293.

¹⁷³ Reg 21 of 1795. *Dharna*: fasting before the threshold of an adversary to demand redress for some injury or the satisfaction of some claim. See following chapter for further details.

Criminal Intention and the Criminal Tribe

Duncan had given the petty thieves who confessed to their 'evil disposition' severe sentences on the argument that they were 'irreclaimable'. But he showed some perplexity about coming to the same conclusion about a prisoner who declared that he robbed because he came from a 'tribe' whose profession it was to plunder. How was the criterion of criminal intention, now so prominent in the assessment of guilt and responsibility, to be applied? Ekla, leader of one of the bands termed the *Sain Bajuas*, had confessed to two armed raids on merchants in which one person or more had been killed. Duncan said he deserved death, but observed that Ekla conceived that he was only following the vocation to which he had been born and which he thought his caste entitled him to exercise:

whence a question may perhaps arise how far men acting under such prepossessions are in the Eye of an enlightened Humanity or of reason objects of very severe Punishment, since the Essence of all criminality consists in the Intention and [the] System of caste in India has such an operation that he who is born of a Thievish Tribe can hardly extricate himself or take up a better or more honest Employment.¹⁷⁴

The Board evidently did not think it necessary to consider the question of criminal intention so very delicately and endorsed the death sentence passed by the mulki faujdari adalat.¹⁷⁵ But Ekla then retracted his confession, and the law officers of the mulki adalat who had condemned him on the basis of this admission, declared that by hadd laws capital punishment was no longer valid, though the hakim could inflict the death penalty *siyasatan*, 'by way of coercive discipline for the public good'.¹⁷⁶ The Board resolved that Ekla should suffer death; this was the only case I have come across in Duncan's residency where capital punishment was actually enforced on the invocation of *siyasa*.¹⁷⁷ The case is

¹⁷⁴ RB to GG in C, 27 February 1792, BRJ P/127/78, 13 April 1792, pp. 528-35.

¹⁷⁵ The Banaras adalat had said he was liable only to imprisonment. Ibid., 528-9.

¹⁷⁶ Extract from progs of RB, 20 June 1792, BRJ P/127/79, 29 June 1792, pp. 377-92.

¹⁷⁷ In case of Rehman the resident had advocated capital sentence *siyasatan* but the Board had changed it to transportation for life. See above.

interesting for the expression of a point of view on 'criminal communities' different from that formulated by Hastings in justification of Article 35. Should some communities be placed outside the universalist presumptions of rule of law when their social mores seemed to converge with the rest of the subject population? The subsequent formulation of laws resting on the notion of criminal communities should not obscure earlier differences on this issue.¹⁷⁸

Ranajit Guha's proposition that colonial rule was 'an absolute externality with no mediating depth, no space provided for transactions between the will of the rulers and the ruled' does not take us very far along the range of social interests and normative codes constantly evaluated in colonial law-making.¹⁷⁹ Of such mediations the most easily visible were those involved in the effort to re-orient the cognitive world of Indian agency, with its own definite views about the place of the state in the regulation of social order. Rule of law under a colonial despotism was certainly riven with contradictions. Here Guha's references to the anomalies of race privilege and forced labour are appropriate, although historical shifts in their legal status have to be assessed more precisely.¹⁸⁰ Yet it has after all been possible for autocracies to evolve forms of 'rule of law' without conceding rights of political liberty and citizenship.¹⁸¹ In colonial India a despotism based on law could be extolled as superior to the arbitrary oriental variety.

Support for what Guha terms the idea of *danda*, the exercise of punitive authority on behalf of social hierarchy, could not be the only component of the colonial claim to legitimacy. In part this was because military pacification and the redefinition of sovereign right demanded an extension of the claims of the state into these spheres of social authority. Colonial magistrates and

¹⁷⁸ See chapter five.

¹⁷⁹ 'Dominance without hegemony and its historiography', *Subaltern studies*, VI, 1989, reprint, 1994, pp. 210-309.

¹⁸⁰ 'Dominance without hegemony', p. 213. Cf. M. Anderson, 'Work construed' in P. Robb (ed.), *Dalit movements*, 1993, pp. 87-120.

¹⁸¹ I am referring here to Guha's contention that the colonial state was structured as an autocracy that did not recognize any citizenship or rule of law. 'Dominance without hegemony', p. 229. Alexander Dow for instance reassured his readers that to give Indians security of property would not 'infuse a spirit of freedom dangerous to our power.' *The history of Hindostan*, vol. 1, 1803, p. clv.

judges certainly wished to demonstrate a sympathy for patriarchal authority and values of masculine honour, but these norms had to be reorganized to some conformity with the legal claims of the state.¹⁸² Pacification also brought changes to the nature of lordship and the terms in which political resources were calculated. The military feudal levies of the pre-colonial period became gangs of *lathials*, musclemen. Even where the state strove to draw social influence to the support of law and order and to keep institutional costs low, the terms of power-sharing which it offered were not always attractive. In 1807, when police powers were taken away from the tehsildars, there was a parallel effort to draw zamindars to the support of policing by a provision for appointing them as police amins (officials). But an anxiety that they might misuse these powers meant that real authority still rested with the darogha, so the scheme failed to associate social influence with colonial order. A criminal case could still be crucially shaped by decisions taken in the zamindar's kachcheri, but these decisions were not always in alignment with the aims outlined in police and judicial regulations.¹⁸³ Colonial procedures of policing and prosecution narrowed the room for the evocation of certain identities of rank and respectability. I have examined the issue of the judicial oath to suggest that the idea of a standardized procedure to oblige all parties to attend and testify could make the criminal courts a potentially threatening space for Indian elites.¹⁸⁴ They feared the ignominy of being brought to court on the complaint of a social inferior, and having to swear to the truth of their testimony. The Azamgarh proclamation issued by the emperor Bahadur Shah's grandson in 1857 conjured such nightmares of inversion, referring to zamindars being disgraced by summons 'on the institution of a suit by a common Ryot, a maid servant, or a slave.'¹⁸⁵

Yet, as subsequent discussions of the Company's penal regime will indicate, there were important instances in which colonial criminal law and policing sought an alignment with various

¹⁸² See chapters three and four.

¹⁸³ Cf. J.R. Hand, *Early English administration of Bihar*, p. 81.

¹⁸⁴ In the civil courts men of rank could claim some immunity from personal appearance, in the criminal courts this was more difficult.

¹⁸⁵ R. Mukherjee, 'The Azamgarh proclamation', in *Essays in honour of Prof S.C. Sarkar*, 1976, pp. 477-98.

registers of social hierarchy.¹⁸⁶ The seclusion of 'respectable' women was one such index of rank reified in many features of colonial law.¹⁸⁷ Conversely, there were forms of social classification which may have made it acceptable for the colonial police to use force and torture on certain groups to extract information. Attitudes among sections of the Indian elites towards the poor and low caste shaped the characterization of some communities as socially debased and criminally inclined. At the same time, notions about the right order of society, inscribed in procedures of colonial government, differed in certain ways from those of the Indian elites, as for instance, in attitudes towards mendicancy and charity. This difference, as it found expression in law and police practice, may have imposed sharper boundaries of marginality for some groups, whittling away the legitimacy of their claims to the social surplus.

¹⁸⁶ Cf. chapter six.

¹⁸⁷ See chapter four.

Chapter Three

The Privilege of 'Taking Life: 'Anomalies' in the Law of Homicide

In evaluating the state of mind 'behind' the criminal act, British judges were confident that there was a universal standard by which intention could be evaluated. They were less confident about being able to understand motive.¹ The question of motive was the point of negotiation between the new terms of authority outlined by the state and the sensibilities of its Indian subjects. Should such sensibilities be taken into account as grounds for mitigating punishment? One circuit judge declared impatiently that it was

highly dangerous to the peace of society to permit murderers to escape justice, merely because a European judge, very imperfectly acquainted with the motives of action which prevail among the natives, could not discover the train of reasoning which induced them to perpetrate such diabolical acts.²

Even so, the question of motive, whether interpreted as superstition or religious belief, defence of honour or contumacy, material gain or spiritual benefit, forced itself to the attention of colonial courts and influenced the definition of the offence and the scale of heinousness by which it was judged.

Colonial judges, anxious to impress upon the defendant that it was his criminal intention and motive which justified punishment,

¹ The advertisement for W.H. Macnaghter's second volume of *Reports of cases determined in the Nizamat Adalat (NAR)*, promised that it would familiarize the judge 'with the ideas and springs of action among those to whom he dispenses justice, for to European notions, the motives which instigate the commission of offences are sometimes inadequate, and not always comprehensible . . .'

² *NAR*, II, 1820-6, p. 344.

would write in exasperation of Indians blaming destiny for their actions.³ However, the defendants would also invoke certain sources of authority — religious belief, patriarchal or patronal right — in self-exoneration. The third issue in the jurisprudence of homicide was that of the will or volition of the victim, and whether this should exclude or mitigate the punishment for murder. Related to this was the question of whether forms of suicide, assisted or otherwise, should draw some penalty. One of the determining factors was whether the suicide posed a public challenge to the juridical authority of the state or could be relegated to the realm of the personal and the domestic. When a spiritual motive was attributed, government trod warily, seeking to find religious sanctions to curb its incidence. In England, the eclipse of religious and magical beliefs which justified penalties for self-murder had prompted coroner's juries to deliver verdicts of *non compos mentis* from the eighteenth century.⁴ In India, colonial officials were usually ready to accept the religious or 'superstitious' motive behind forms of ritualized suicide, attributing it to the low value placed on life, particularly by the tenets of the Hindu religion.⁵ A magistrate of Allahabad reported that those who drowned themselves in the river there seemed to reason calmly about their decision, 'but the foundation of their arguments is false and absurd; such a state of mind would in our country constitute a near approach to derangement, perhaps a positive assurance of madness.' However, of sati he stated that he found the minds of the women 'quiet and resigned'.⁶

The criminal laws which outlined a monopoly for the state in the right to take life were shaped in conflict with other 'traditional' codes of authority, religious, patriarchal or patronal, which claimed a competing privilege in the matter. This privilege could also be

³ When guilty of murder, complained the Judge of Jaunpur, 'their constant answer is that it was their destiny. They are not willing to acknowledge what was their motive . . .' 17 February 1801, *PP* 1812-13, vol. 9, p. 283. 'The divine Decree had destined her to Death that I slew her', stated Rehman who had killed his mother; and again, the killing 'was written in my destiny'. Extract progs RB, 26 May 1794, BCrJ 128/12, 11 July 1794, pp. 500-1, 511.

⁴ M. MacDonald, 'The secularisation of suicide in England 1660-1800', *Past and present*, 111 (May 1986), pp. 50-100.

⁵ Cf. Marchioness of Bute (ed.), *The private journal of the Marquess of Hastings*, I, 1858, p. 53.

⁶ Home Misc. 776, pp. 977, 993.

used to invoke certain rights and claims, thereby challenging the state's justice as well as its civil order. At the same time, the Company's government often found itself in a position where it had to draw upon those very sources of 'traditional' authority to make its juridical claims intelligible and acceptable to the subject population, which in another context it was trying to marginalize.

This chapter focuses on the kind of conceptual tensions which this process inducted into colonial law, taking up two so-called anomalies in the regulations relating to homicide: Regulation 16 of 1795 which exempted Brahmins of the Banaras province from the death penalty, substituting it with transportation for life; and the exemption given to those assisting in the rite of widow immolation from prosecution for murder. The 'toleration' extended to sati rested, not on any specific regulation, but on a construction, or clarification, which the Nizamat Adalat gave of Regulation 8 of 1799. Section 3 of this regulation had declared that

it shall not justify a person convicted of wilful homicide that he, or she, was desired by the party slain to put him or her to death.

On 22 June 1817, the Nizamat Adalat specified that this section did not apply to sati or the suicide of lepers because these acts had the sanction of the shastras.⁷ British government did not thereby commit itself to a regular consultation with the Hindu shastras in criminal justice. It was the Islamic law which was the substantive law in the criminal courts of the Bengal Presidency, modified and supplemented by the Company's regulations. The 'Hindu law' was cited in the criminal courts in very specific contexts, to lend religious authority to the judicial oath, to provide associations of sin and social censure to buttress the criminalization of certain 'superstitious practices', and, in the case of sati, to restrict its incidence, but also to demonstrate the Company's religious toleration.⁸ The widow was permitted to divest herself of the state's

⁷ Progs of NA, 25 June 1817, *PP*, 1821, vol. 18, pp. 403-5.

⁸ The Company's intervention to regulate the rite of sati was therefore not, as Vasudha Dalmia-Ludertiz holds, part of an undertaking to administer Hindus and Muslims according to their own legal codes. She argues that by abolishing sati British government approximated to the position of 'a Brahmin prince, albeit enlightened, who could confidently amend'. Vasudha Dalmia-Ludertiz 'Sati as a religious rite', *EPW*, 25 January 1992, pp. 58-64. My proposition is that this law was in fact passed to resolve an unease about getting enmeshed in theological disputes regarding sati.

juridical claims over her person, and assume another identity, that of a believer in the efficacy of a religious rite, but only insofar as she 'consented' to her immolation, and only insofar as this immolation was permitted by the Hindu law.

The Construction of Tradition

The debates about sati, Mani argues, 'were a mode through which colonial power was both enforced and contested', but because of their superior power, colonial officials shaped the terms of the discourse.⁹ There is a tendency here to assume that the state could always obtain that version of tradition which it needed, and that the Indian elites would accept it.¹⁰ Colonial laws and procedures of governance did indeed outline this model of interaction, but it was put under constant pressure by alternative versions of tradition presented by various sections of Indian society. I would therefore disagree with Lata Mani's proposition that, in the case of sati, 'divergent indigenous male elite responses' reproduced the official equation of religious tradition with scripture. In fact the anti-abolition party challenged the reformers and opposed official intervention in the rite with the argument that usage was as important a part of religion as scripture, and, that the standing of the interpreter was as significant as the standing of the text.¹¹ They insisted that only the interpretations of the pious and the orthodox could carry weight, not those offered by Rammohun Roy and others whom they accused of an unorthodox lifestyle, or by Christian officials. In turn, as administrators it would have been foolhardy for colonial officials to assume, that the religion of their subjects was constituted by the dictates of the 'scriptures'.¹² The citation

⁹ Lata Mani, 'Production of an official discourse on sati', *EPW* (26 April 1986); and 'Contentious traditions', in K. Sangari and S. Vaid (eds), *Recasting women*, 1989, pp. 88-126.

¹⁰ 'Contentious traditions', p. 89.

¹¹ Cf. petition of orthodox of Calcutta, 14 January 1830, in J.K. Majumdar, *Rammohun Roy and progressive movements in India*, 1941, pp. 156-63. See below for the way in which the pandits of the Sadar Diwani Adalat reinvoked the authority of usage and inspiration during the trial of 'irregular' satīs.

¹² At one point Lata Mani says colonial officials assumed that religion was constituted by the dictates of scripture, at another point she states that religion emerged as merely that part of culture that colonial power chose not to interdict. 'Production of an official discourse', ws 35, ws 38. These are somewhat different positions.

of text gave government the authority to intervene in certain social usages, but this invocation was also mediated by the audience being addressed. This is clearly illustrated by a comparison between Bentinck's minute on sati, intended to reassure official misgivings about the safety of a formal enactment, and the preamble to the sati legislation addressed to the Company's subjects. In the former, Bentinck plainly acknowledged the orientalist H.H. Wilson's warning that it would be a dangerous evasion to attempt to prove that sati was not essentially a part of the Hindu religion.¹³ But in the preamble he took a different stance, arguing both that sati was not an imperative religious duty and that it had proved impossible to prevent 'abuses' in its performance.¹⁴

The second point I want to stress is the difficulty of confining the citation of a particular symbol of traditional authority, for instance, that of religion or brahmanical scholarship to the requirements of colonial policy. And here the issue of 'native misunderstanding of colonial intentions', which Mani only touches upon,¹⁵ can be very illuminating. British magistrates were instructed to present the restrictions being placed on sati as deriving solely from the shastras. But they were also warned not to give the impression of engaging in theological controversy.¹⁶ The Company's toleration of the rite was supposed to exemplify the freedom it allowed on religious matters, but Indians were not supposed to conclude that government actually approved of it. For this reason, the Bengal government consistently shied away from passing any regulation which would define the permissible sati. The circular order of 29 April 1813 which Lata Mani terms

¹³ 'The question', admitted Bentinck, 'is not what the rite is, but what it is supposed to be.' Minute on sati, 8 November 1829, in C.H. Philips (ed.), *The correspondence of Lord William Cavendish Bentinck (CLWCB)*, 1977, 1, pp. 338, 344.

¹⁴ Preamble to Reg 17, 4 December 1829, abolishing sati, *ibid.*, p. 360.

¹⁵ In trying to explain why the incidence of sati had increased despite efforts to curb 'irregular' performances, officials said natives had 'misunderstood' the intentions of government. Mani does not go into this issue beyond a passing remark that officials attributed this misunderstanding to native bigotry. 'Production of an official discourse', *ws* 36.

¹⁶ The Poona magistrate who had expounded shastric injunctions on sati to an assembly of Brahmins was warned against giving the impression of a 'doctrinal dispute'. Secy, Bombay Govt to Commr Deccan, 11 December 1823, *Judl Dept vol. 19/80*, 1824, p. 385, Maharashtra State Archives, Bombay (MSA).

a regulation was merely a set of instructions to guide the police and the magistrates. Yet the terms 'legal', 'legal and voluntary' and 'authorised' were loosely used in official correspondence, referring to the circular orders of government or to citations from the shastras. Evidently it was difficult to keep the two sources of legality apart.

Bentinck's minute on sati indicates that he addressed himself to different audiences even within the European public. The Orientalist stance of restoring to Indians the truths of their own religion, which Mani so deftly explores, does not cover the range of disturbing implications which the spectacle of sati could evoke.¹⁷ Utilitarian complaints about the legal anomaly presented by sati, the racial reaction against 'offensive and disgusting spectacles' which threaded conflicts over municipal space, and Evangelical sensibilities about the brutalizing effect of spectacles of 'torture' shaped both official and non-official arguments for its abolition. In his minute on sati, Bentinck reassured conservative officials and Orientalists that it was safe to abolish sati; he assumed an imperial style when he linked his proclamation to the demonstration of paramouncy; and finally he invoked an agenda of moral instruction for the Hindu subjects of the Company, referring to the 'dissociation of religious belief from blood and murder' and their liberation from 'brutalizing excitement'.¹⁸

Sacred Place, Sacred Person, and Due Process of Law

It was in a proclamation of 28 December 1790 that the Company formally conceded the exemption of Brahmins of the Banaras raj from capital punishment. The concession is ironic, for one of the charges which Hastings had levelled against Raja Chait Singh, deposed in 1781, was that of partiality in justice: 'the sacred character of a Bramin, or the high rank of the offender were

¹⁷ I am addressing myself here to Mani's statement that official arguments for prohibiting sati were not primarily concerned with its cruelty or barbarity, and that the regenerating mission of colonialism was conceptualized, 'not as the imposition of a new Christian moral order but as the recuperation and enforcement of the truths of indigenous tradition.' 'Contentious traditions', p. 95.

¹⁸ Minute on sati, 8 November 1829, *CLWCB*, vol. 1, pp. 334-7. Cf. J. Rosselli, *Lord William Bentinck*, 1974, for the influence of Evangelical thought upon Bentinck.

considerations which stamped a pardon on the most flagitious crime.¹⁹ In setting up an *adalat* for Banaras city, Hastings wanted to vest the Company with one of the symbols of sovereignty over the Zamindari.²⁰ But in the jockeying for kingly status in the eighteenth century, Banaras had a certain supra-territorial significance as well. Maratha chieftains had vied for status as patrons of the sacred city, endowing various temples and charities. In fact the Peshwa's terms for a treaty with the Company in November 1781 included a demand that Banaras and Allahabad be sold to him, for he held them sacred.²¹ Now Hastings too claimed this prestige for the Company, declaring that it had made the protection of Banaras its special concern, 'not only . . . with regard to its own inhabitants, but as a city respected by the whole race of Hindoos . . .'.²² But this acknowledgement of a special status for Banaras would also be cited back to the Company when its residents opposed certain taxes and municipal regulations.²³

Wresting Authority from the Sacred: The Case of Dharna and Kurh

To Duncan, the inhabitants of the Banaras zamindari presented a striking contrast to the 'civilised and patient inhabitants of

¹⁹ WH to E. Wheler and Council, 1 November 1781, Second report from the Select Committee, 1782, *Report of the committees of the House of Commons*, vol. v, 1804, p. 502.

²⁰ WH to E. Wheler and Council, 21 November 1781, *Second report*, p. 533. Revenue collection remained the prerogative of the new Raja Mahip Narain, but he was informed that he could no longer be allowed 'the Exercise of any Privilege or Authority on which an opinion of Independency could be founded: That the Mint, the Cutwally, or Police of the Town of Banaras and the administration of Justice to its Inhabitants, the Power of levying Forces, and maintaining Fortresses, were commonly understood as Kinds of Royalties or Appurtenances of the Sovereign State.' *Ibid.*

²¹ *CPC*, vol. vi, 1781-85, No. 304, 21 November 1781, p. 11.

²² *Hukamnamah* from WH about the establishment of the Banaras *adalat*, 14 October 1781, in *Banaras affairs*, Allahabad, 1956, vol. 1, pp. 116-17. This was addressed not only to the *amil*s and inhabitants of Banaras but also to all sojourners and pilgrims. The extension of the Company sovereignty over Banaras city also gave it diplomatic advantage in negotiations with the various kings and chiefs who came on pilgrimage to the city.

²³ And the authority of Brahmins and ascetics would also be drawn into this oppositional field. See below.

Bengal. . . .²⁴ Incredible instances were related, he wrote, 'of their having been known, not only to lay hands on themselves, but even systematically to put to death other innocent persons, in resentment for their disappointment, from whatever cause. . . .'²⁵ Two episodes provoked this comment. The *amil* of Bhadohi reported that some Brahmins refused to stop collecting *rahdari*, 'and when I renew and enforce my insistence against doing so, they are ready to stab themselves with a knife.'²⁶ In another case three Brahmin cultivators, in protest against the sum demanded by the *amil*, had put up a *kurh*, placed an old Brahmin woman in it and threatened to set it alight. *Kurh*, the resident explained, meant

a circular pile of wood . . . wherein is fastened sometimes a cow and sometimes an old woman . . . and who on the pile's being fired of course are burnt, which is thought to involve the *amil* who occasions such a sacrifice in a great sin, and has therefore . . . been used in sundry instances to deter the collectors of revenue from pressing too severely.²⁷

The contrast which Duncan drew with the 'patient' inhabitants of Bengal reads oddly, given the Company's concern over the waves of banditry which seemed to overwhelm the Bengal countryside at the time.²⁸ Perhaps the contrast lay in the fact that faces in the Bengal dacoit gang remained opaque to government, while here, in the Banaras zamindari, the Brahmins of certain parganas directed violence against their own person, or against female relatives, publicly, dramatically, and with a complete assurance of their right to do so.

In 1792 Duncan reported another 'peculiar' form of defending a claim, the practice of *dharna* 'one of the superstitious prejudices, which have so long and so generally been cherished here . . .'.²⁹

²⁴ RB to GG in C, 1 May 1788, Bengal Public Cons, 11 June 1788, in *PP*, 1821, vol. 18, p. 298.

²⁵ *Ibid.*

²⁶ Enclosure, in RB to GG in C, 1 May 1788, *ibid.*, p. 299. *Rahdari*: tolls on goods and travellers.

²⁷ Progs of RB, 16 August 1788, *ibid.*, p. 299.

²⁸ J.R. McLane, 'Bengali bandits, police and landlords after the Permanent Settlement', in A.A. Yang (ed.), *Crime and criminality in British India*, 1985, pp. 16-47.

²⁹ RB to GG in C, 11 October 1792, *DR*, Basta 11, No. 63, October 1792,

A person undertook a dharna when he 'cast himself' at the threshold of a person against whom he had a grievance to be redressed, or a debt or claim to be satisfied. He would refuse to get up or eat, and would obstruct the movement of the household till the offending party negotiated terms.³⁰ Dharna could imply a resolution to fast even to death if the opponent did not relent, the death literally being laid at the door of the 'oppressor'. Dharna put pressure not only on the adversary but also on his family, exposing the issue to the opinion of the neighbourhood.³¹ When a Brahmin or ascetic sat on dharna, it heightened the sense of a dissonance in the right order of affairs.³² Duncan reported that if the Brahmin was resolute, he usually came off triumphant, 'since if he died of hunger the sin of a Brahmin's Blood for which there is no expiation would remain on his [the adversary's] head.'³³ A Brahmin might escalate the pressure by stabbing himself or taking poison. Such incidents of casting blood-guilt came to the attention of the resident, both from disputed claims between individuals,³⁴ as well as from contests over the payment of revenue and from resistance to duress in its collection.³⁵ There were two issues of significance

RAA. Benoo Bye, a Brahmin widow, had sat on dharna against her brother-in-law to secure a satisfactory maintenance from him. Duncan described her as 'skilled in all the terrors of the Brahminical character', *ibid*.

³⁰ RB to GG in C, 24 October 1794, BCRJ P/128/15, 7 November 1794, p. 644.

³¹ In one description the household at whose door the dharna was being held was also supposed to fast as long as the person on dharna did. The pandits of the Mulki Faujdari Adalat and twenty-two other Brahmins of Banāras stated that the person sitting on dharna was to tell the members of the household on oath that if any of them ate, or went in and out of the house, he would swallow poison. Enclosure, in RB to GG in C, 24 October 1794, *ibid*.

³² The sacredness of the person of the Brahmin was a resource which other people could employ to press a claim, or counter a claim. One Bundholal who objected to a Gosain's cattle breaking into his fields, found him sitting at his door and swallowing poison, supported by a disciple who slashed at his own belly. Bundholal went and got someone else, presumably a Brahmin, or ascetic, to swallow poison on his own behalf. Progs of the Mulki Faujdari Adalat, 20 September 1789.

³³ RB to GG in C, 11 October 1792, DR, Basta, 11, No. 63, October 1792, RAA.

³⁴ RB to GG in C, 14 January 1789, BRC P/5/38, 4 February 1789, p. 202, for a dispute between two Mahabrahmins over *birt*, a hereditary claim to religious donations.

³⁵ RB to GG in C, 26 April 1782, BRC P/51/38, 17 June 1789, pp. 1037, 1481-94.

here for the resident's efforts to reorder the judicial process: the right to use force and violence to press a claim, or to defend special privileges in revenue payment, and the invocation of a field of arbitration which could challenge the justice of decisions taken in the Company's adalats and even overturn them.

In the Company's records, and in contemporary European accounts, trial by ordeal, dharna, kurh, and other such forms of contesting an issue or seeking redress, were characterized as products of a barbaric state of civilization. Writing in 1798, W. Tennant, army chaplain, attributed the use of dharna to recover debts to the defects of a 'miserable' system of judicature, which had to be compensated by calling upon the aid of superstitution.³⁶ But the Company could not rely only on the superior 'rationality' of its own institutions of justice to supersede these practices. Dharna and kurh had to be defined as crimes. In other words, they had to be wrenched out of the codes of meaning and the structures of authority in which they were embedded.

The Sacred as 'Facilitator'

When European observers attributed dharna and kurh to the negligence of Indian rulers in providing better channels of justice, they were registering the limited intervention of the state in certain areas of dispute. But dharna and kurh did not operate in isolation from other areas of authority and arbitration; they linked them, even if only for a limited duration.³⁷ They were often used

³⁶ W. Tennant, *Indian recreations*, second edition, 1804, vol. II, p. 260. John Shore also attributed the use of dharna and kurh to the negligence of Indian rulers in providing other channels of justice. 'On some extraordinary facts, customs and practices of the Hindus', *Asiatic researches*, vol. IV, London, 1799, pp. 331-50. *Tragga*, a similar mode of seeking redress reported from the Bombay Presidency was attributed to the 'insecurity of right and the imperfection of tribunals, under the native governments . . .'. Memorandum of the improvements in the administration of India during the last thirty years, PP, 1857-58, vol. 33.

³⁷ In analysing the various spheres of authority invoked in the settlement of disputes, Bernard Cohn places them too much in isolation from each other. Of dharna and kurh he writes, 'These more spectacular aspects of dispute settlement were infrequent compared with the outright use of force.' 'From Indian status to British contract' in *An anthropologist among the historians*, pp. 463-82. C.A. Bayly has drawn attention to the Shaivite and Vaishnavite ascetic orders as social groups who could operate in the interstices of states.

to reopen a process of negotiation rather than to demand outright capitulation, to draw in the intercession of acquaintances or arbitrators, for instance, the canungos, or the local hakim.³⁸ The sight of a Brahmin exposing himself to suffering was supposed to widen the sense of social jeopardy, obliging the community or the ruler to intervene.³⁹ During the agitation of 1810 against the imposition of house tax in Banaras, the inhabitants presented a petition explaining that *hartal*, the closure of shops and the suspension of all normal activity, did not imply contumacy but was a customary way of exposing oneself to suffering to make one's distress known: 'besides this when the Brahmins in general are involved in distress, it is incumbent on all Hindus to abstain from receiving sustenance and anyone who presumes to deviate from this custom must incur general opprobrium.'⁴⁰ The person inflicting violence on himself, or on a female member of his family, was usually the weaker party, or one who did not desire a fundamental rupture of the relationship with his adversary. Tennant, for instance, reported that whereas the rich or powerful would imprison their debtors themselves, those without influence would sit on dharna, or hire Brahmins to do so on their behalf.⁴¹ The public and dramatic nature of the act could be directed to impress the memory of a claim upon the community, even if a definite resolution was deferred.

When such pressure actually extended to suicide, or to putting

and arbitrate on disputes because they were supposed to be estranged from caste, class and worldly wealth. *Rulers, townsmen and bazaars*, pp. 142-3.

³⁸ *Hakim*: ruler, the person in authority here usually the revenue farmer.

³⁹ It was in this way that a Hindu 'of considerable rank' described the practice in its pristine form to W. Tennant. He said that in former times, not only the litigant but the whole village fasted so long as a Brahmin sat on dharna. *Indian recreations*, II, p. 26.

⁴⁰ Magt Banaras to Secy, Judl Dept, 7 February 1811, BCrJ 130/29, 22 February 1811. In the communal clashes of 1809 in Banaras, when the Gosains went on a fast, the magistrate interpreted this as an act directed against the government, 'to extort concessions from the danger to be apprehended from their influence and example.' Actg Magt Banaras to Senior Judge, Banaras CC, 14 April 1810, Actg Magt Banaras to Secy, Judl Dept, 30 October 1809, BC F/4/365, pp. 53, 304. Perhaps it was the importance of maintaining the sacred as a cultural resource which explains why a whole village might perform a penance for the accidental death of a Brahmin, or a cow, or send the slayer into exile till he expiated his sin.

⁴¹ *Indian recreations*, II, p. 260.

a female relative to death, the darker realm of the supernatural was invoked more directly. The blood-guilt for causing a Brahmin death not only brought future retribution in the form of a long period in *narakh* (hell), but also conjured the presence of the restless and vengeful spirit of the deceased to haunt the adversary and blight his fortunes.⁴² The curse of a Brahmin woman, as she was put to death or committed suicide, was held in particular dread. In a feud over revenue farming rights, a Brahmin beheaded his mother to cast infamy upon his opponent, Goury Choudhary. Her last words were reported to have been that she would 'blast' Goury Choudhary and all his connections.⁴³ Allaud Brahmin recounted that when the faujdar's men seized him for revenue arrears, his aunt had swallowed poison saying, 'We are Brahmins and as the Faujdar has beaten a Brahmin so will I eat or devour' him.⁴⁴ The funeral rites were withheld to encourage the dead person's spirit to remain restless in pursuit of the oppressor.⁴⁵ The body might be buried in the disputed field, or at the threshold of the adversary's home, instead of being cremated or consigned to the river.⁴⁶ The *bhut* of the deceased was 'awakened' by the beat of a drum over three days.⁴⁷

⁴² See below.

⁴³ RB to GG in C, 2 October 1789, BRC P/51/49, 31 October 1789, pp. 186-94.

⁴⁴ RB to GG in C, 26 April 1789, BRC P/51/38, 17 June 1789, p. 1504. Here *faujdar* referred to the revenue farmer.

⁴⁵ The *shraddha* rites which followed cremation were supposed to aid in the transformation of the spirit of the dead, *preta*, into a hallowed and beneficent ancestor, *pitru*. C.A. Bayly, 'From Ritual to Ceremony', in J. Whaley (ed.), *Mirrors of mortality*, 1981, pp. 154-86. Babb notes that the rites of the dead deal with two problems presented to the living, intense pollution and a potentially malevolent ghost. L.A. Babb, *The divine hierarchy*, 1975, pp. 90-1.

⁴⁶ In protest against another cultivator who claimed partnership in a field, one Ballo Sewak killed his own infant daughter and buried her in the disputed plot. RB to GG in C, 2 November 1793, BCrJ P/128/7, 22 November 1793, pp. 204-13. Bishop Heber was told of a cultivator who had burnt his wife on a disputed field, 'in order that her death might bring a curse on the soil and her spirit haunt it after death, so that his successful antagonist should never derive any advantage from it.' R. Heber, *Narrative of a journey*, vol. I, 1843, p. 155. After Mohun Brahmin poisoned himself before the home of a Rajput family for withholding his *birt*, his widow had the body buried at their door. RB to GG in C, 24 October 1794, BCrJ P/128/15, 7 November 1794, pp. 651-5.

⁴⁷ In Allaud Brahmin's description the spirit was 'awakened' for twenty-one days, after which the bones of the woman were thrown into the river. RB to GG in C, 26 April 1789, BRC P/51/38, 17 June 1789, pp. 1506-7. *Bhut*: ghost

Thus the notoriety of the event and the pressure on the adversary was sustained even after the suicide or killing. But so too was the opportunity of coming to an agreement.

If the injured party or his heirs 'received satisfaction', then the polluting body was removed and the usual rites to set the spirit at rest were performed. A refusal to dispose of the body was widely reported from many contexts as a means to force the intervention of the hakim. The amil of Ballia complained that the Brahmins of that pargana would fight among themselves, then bring the body to the kachcheri and cry for justice.⁴⁸ When Beechuk Brahmin cut off his mother's head in a disruptive feud over revenue collecting rights, the amil sent his deputy and the canungo who 'in vain attempted by caresses and encouraging words to prevail on the man who had slain his mother to permit funeral rites to be performed.'⁴⁹ I have also come across two cases in which a low caste man put his infant daughter to death to protest his treatment at the hands of the locally powerful. In these cases *kati* (murder), was inflicted on the person's own child, the act being directed to reproach a more powerful adversary. It was simultaneously a register of injustice and a power-laden selection from the weakest in the family.

However, the Brahmin would argue about 'injustice' as much in terms of an insult to his honour as in terms of the infringement of some material right. The infamy of having caused the shedding of Brahmin blood was the weapon he could wield. The low caste claimant for justice could not formulate his claims in the language of honour.⁵⁰ But by thrusting a polluting body into the terrain of

⁴⁸ RB to GG in C, 2 October 1789, BRC P/51/49, 21 October 1789, p. 936.

⁴⁹ Roop Singh, amil of tappah Chowassy, pargana Kantit, to RB, 24 June 1789, *ibid.*, p. 733.

⁵⁰ Dhunoo Chamar, reproached for drinking and abusing his superiors, killed his four year old daughter at the house of one of the village *maliks*. He then seated himself at the door with the body, thereby barring that family from eating or social interaction. But in the *adalat* he did not attempt to explain his action in terms of anger, but in the language of parental right and fate, 'this little Girl belongs to me. It was God's will that she should be killed by my hand.' His wife attributed the deed to intoxication. BCRJ P/128/14, 26 September 1794, pp. 914-34. But the government equated the case with those in which Brahmins killed a female of their family to claim justice, and sentenced Dhunoo to transportation for life 'in conformity with the usage established in Benares with regard to such cases . . . ' *Ibid.*, p. 933. *Malik*: proprietor, patron, master.

power he did inconvenience his adversary, as much as he brought conviction to his charge of *zulm*.⁵¹ In one cruelly wrenching case Adheer Dom, a village watchman, said that the *zillabdar*, Bukshoo Singh, had fettered him, beaten him and two women relatives, and confined his son to make him confess to a robbery: 'I desired him to exact from us the ordeal oaths of the . . . hot iron or oil, but he wouldn't listen . . . I being helpless, put my Daughter to death and threw her corpse before Bukshoo Singh's door.'⁵²

The *Seir Mutaqherin* gives an interesting variation of the claims which could be made around the disposal of the body. A creditor, or employee, deprived of his dues by a powerful man, might stop his corpse on the way to the burial ground by placing his hands on it and reciting a sentence from the Quran. The relatives and other mourners would then negotiate some terms for repayment.⁵³ I have come across some cases in which sati is performed as an extension of the rhetoric of feud, or as a protest against the injustice which had caused the husband's death.⁵⁴

The Hakim and the Authority of the Sacred

Duncan reported that the practice of Brahmins killing or wounding themselves had happened in all former times, 'as far back, as memory reaches . . . ' Yet the earliest reference in his records was

⁵¹ *Zulm*: oppression.

⁵² Adheer explained that he had killed his daughter to claim justice for the confinement of his son and his relations and to establish that he had not committed the theft. RB to Sub-Secy, 13 February 1795, BCRJ P/128/19, 6 March 1795, pp. 22-40.

⁵³ *Seir*, n, 1975 reprint, pp. 246-8 and translator's note, p. 247, n. 172. Cf. *North Indian notes and queries*, vol. iv, 1894-5, No. 105, pp. 46-7 for the story of a merchant Firoz, who settled the debts of a dead man whose creditors would not allow his burial.

⁵⁴ Cf. Lekh Ram's account of a feud between his family and another, both influential Sengar Rajputs of Lakhnesar, in which his brother and three-year-old nephew had been killed. Following this his sister-in-law had burnt herself with her husband's corpse. RB to GG in C, 1 February 1789, BRC P/51/32, 18 February 1789, p. 656. Cf. also petition of Sheo Ruttun Singh objecting to the release of Sheo Prasad, his father's slayer, from jail. He said his father used to support one hundred widows who were threatening 'to commit themselves to the flames' if Sheo Prasad was freed. Extract progs RB, 25 July 1795, BRC P/128/22, 7 August 1795, No. 13, p. 469. A.A. Yang, 'Whose sati?' *Journal of women's history*, 1, 2 (Fall 1989), pp. 74-98, for another reference to sati in the aftermath of an affray.

provided by Allaud, a Brahmin pattidar of Bhadohi, who recalled an incident under Raja Balwant Singh when two women poisoned themselves because the amil confined their relative for revenue arrears.⁵⁵ There are more such incidents recounted for the reign of Chait Singh (1770–81).⁵⁶ The deployment of threats of self-injury and kurh to negotiate revenue payment, or to defend or dispute rights over land, was common only in the parganas of Bhadohi, Kantit, Ballia and Kharid, where Brahmins clustered in large villages and often formed the more privileged layer of cultivators. Their land rights seem to have originated either in religious grants made by local power holders on very favourable terms,⁵⁷ or in *pabikasht* arrangements by which the Brahmins took up cultivation in other villages, employing low-caste cultivators to do the actual work.⁵⁸

Balwant Singh had fashioned the zamindari of Banaras by attacking the Rajput raja of Kantit (1737), breaching the power of the Monas Rajput chiefs of Bhadohi in 1748, and taking possession of the estates of the Hyobans Rajput raja of Ballia pargana (c. 1760).⁵⁹

⁵⁵ RB to GG in C, 26 April 1789, P/51/38, 17 June 1789. Balwant Singh (1738–70).

⁵⁶ Lala Sadanand, who had served under Chait Singh recounted an incident in which the amil of Bhadohi had divested a Brahmin of his revenue-collecting rights over a village and placed him in the custody of his opponent. In protest the Brahmin cut off the heads of three women and sent them to the amil and then to the raja. The Lala recalled another case in which one Sudish Misr, in protest against the stationing of revenue peons at his house, cut off the heads of two or three women and sent them to the raja at Ramnagar. Letter from RB, 26 April 1789, P/51/38, 17 June 1789, pp. 1568–70. Ram Chander Pandit, the amil of Ballia, said he had heard that in the reign of Chait Singh some Brahmins of village Nagwan had sacrificed themselves before the palanquin of the amil, Meer Sharif Ali, causing 'such a tumult that the Meer was glad to seek his safety in a precipitate retreat.' RB to GG in C, 2 October 1789, BRC P/51/49, 21 October 1789, pp. 936–40.

⁵⁷ Typical of this was the *ganwadb* grant peculiar to parganas Ballia and Kharid. *Report of the revision of the records of part of Ballia district, 1882–1885*, Allahabad, 1886, pp. 33–5, *District Gazetteer*, Mirzapur, 1909, p. 98.

⁵⁸ Duncan complained that the government's revenues had been injured after Chait Singh's expulsion, by Brahmins having taken over (either as zamindars or as cultivators) land which had been cultivated by Kunbis and other castes who paid much higher rates. Resident's progs, 2 January 1790, in *Selections from the Duncan records*, 1873, p. 152. *Pabikasht*: cultivation by non-resident tillers.

⁵⁹ W. Oldham, *Historical and statistical memoirs*, 1870, vol. 1 (HSM), pp. 99–106.

The raja and his successors then sought to appropriate privileged tenures for their own followers and to increase the revenue by pressing down on the village-level controllers of land. Rajput land-holding groups resisted by force of arms; but the Brahmins of Ballia, Kantit and Bhadohi used threats of self-injury and kurh to defend their privileges, organizing these protests to throw the whole revenue-collecting process into jeopardy.

Duncan argued that because the Banaras raja and the amils were Hindus, the Brahmins could work on their fears so as to 'maintain themselves in a state of independency civil or military . . .'.⁶⁰ The Bhumihar dynasty at Banaras might have been more susceptible to such attacks on their religious prestige than some Mughal predecessor.⁶¹ But they sustained their pressure on village zamindars, even if these were Brahmins.⁶² Chait Singh had sent a Muslim saawal to chastise the Brahmins of Nagwan after they had routed the amil, Meer Sharif Ali, also a Muslim. Duncan noted that Mahip Narain usually employed Muslim revenue collectors in Bhadohi.⁶³ Yet Hindu amils also asked for punitive action. One of them justified his measures against a recalcitrant Brahmin saying, 'My master, the zamindars in this pergunnah are Brahmins, how can the money be obtained without severity.'⁶⁴ On their part the 'contumacious' Brahmins insisted that the vengeful spirit would make no distinction between a Hindu or Muslim revenue collector. When Allaud

⁶⁰ HSM, II, pp. 102–3.

⁶¹ Perhaps particularly so because the Bhumihars had to defend their own contested status as Brahmins. However the Bhumihars were also able to draw upon a decision of the Banaras adalat to vindicate their claim, an illustration of the way in which colonial courts opened a new terrain for the negotiation of status. This was the case in which Omrao Misser, tried for his part in Vazir Ali's rebellion, escaped the death penalty because the pandit of the adalat stated that the Bhumihars were Brahmins. F. Buchanan, *An account of the district of Shababad*, 1934, p. 185. A. Ray, *The Rebel Nawab of Oudh*, 1990, pp. 287–8.

⁶² In Bhadohi the Banaras rajas refused to accept that the village zamindars, Brahmin or not, were liable only to a tax demand fixed in perpetuity. They sued them in court for revenue arrears, to replace them with more compliant low caste cultivators. The suicide rate in Bhadohi also continued to draw official attention, although reports of kurh dwindled. *Report of the police administration in North Western provinces for the year 1862*, Allahabad, 1863, p. 43, para 210.

⁶³ RB to GG in C, 26 April 1789, BRC P/51/38, 17 June 1789, pp. 1563–4.

⁶⁴ *Arzi* of the agent of the revenue farmer of Kantit, PP, 1821, vol. 18, pp. 302–3.

Shookul's aunt committed suicide to protest his arrest by the amil Rehm Ali, it was reported that the villagers were beating a drum and crying out

To Sita Ram success and victory.

To Meer Rehm Ali ruin and contumely.⁶⁵

Though Duncan concluded that the ghost was being roused against the Banaras raja, 'as it cannot be supposed to affect the Mohammedan amil', yet in Allaud's account his aunt had specifically threatened this individual. To Duncan's question as to whether the spirit would torment the Muslim faujdar, Allaud replied uncompromisingly, 'It affects everyone'.⁶⁶ Beliefs about unquiet spirits formed part of the general cosmogony Trial by ordeal, with its invocation of the sacred or the supernatural to bear witness to the justice of a claim, was common among Muslims, even though it was forbidden by the Quran.⁶⁷

Similar incidents occurred in relation to Maratha chiefs, and here again the outcome of a clash between the hakim and the sacred depended on the context, not on some inviolable principle. In southern Gujarat it was the Bhats who could invoke the sacred in their person, and in that capacity they often stood surety for the payment of revenue. In turn the Bhats claimed a privileged rate of revenue payment or rent-free land.⁶⁸ In the course of a civil war, however, when the Maratha chief Raghunath Rao fined a town, he refused to exempt the Bhats and Brahmins. Forbes describes how the Bhats then staged a gruesome protest, stabbing about at each other until a number perished. The Brahmins brought two old Brahmin women and killed them. 'After these sacrifices', wrote Forbes, 'neither Brahmins nor Bhats thought it any disgrace to pay their share of imposition'.⁶⁹ Here the Bhats and the Brahmins had had to vindicate their honour to preserve that symbolic code

which upheld their status. The Maratha chief who in peace time might have acknowledged their privileges would not, as war-leader, relent. Tennant describes a situation in which the sacredness of the brahmanical person did take precedence. A Maratha contingent, on pilgrimage to Allahabad around 1798, refused to agree to the sum which the Brahmins demanded for various ceremonies, but capitulated when one of them threatened to cut off his thumb.⁷⁰ The very point of the pilgrimage, prestige and religious merit, would have been squandered by this kind of notoriety.

It was the raja of Banaras who asked Duncan to issue a proclamation threatening to punish those Brahmins 'and other evil disposed and wicked people' who disobeyed the orders prohibiting the collection of *rahdari* and *zamindari*, stabbing themselves and swallowing poison. Their land would be confiscated and they would be expelled from the Raj.⁷¹ Duncan was seeking to enforce a shift from crop-sharing and payment in kind to a fixed sum in cash to ensure a steady and predictable revenue tribute for the Company. The resident's proclamation of 17 January 1789 declared that all inhabitants, Brahmins, *Atits*, and others must pay the fixed amount in cash and not insist on paying in kind or by a crop-sharing arrangement, *agori batui*. If anyone took poison, wounded himself or set fire to his house, on a revenue matter or any other issue, his house and property would be confiscated and he would be expelled from the Company's domains.⁷² The additional and significant provision was that if someone killed himself protesting this order, his funeral rites would not be performed.⁷³ I have not, however, come across any instance in which the resident actually carried out this threat.⁷⁴

⁷⁰ *Indian recreations*, II, p. 249.

⁷¹ Letter from the Banaras raja, received 8 April 1788, Resident's progs, Basta 20, Register 5, April 1788, RAA. Grant, a former British resident, had issued a similar proclamation. Enclosure, RB to GG in C, 26 April 1789, BRC P/51/38, 17 June 1789, p. 1033.

⁷² *Ibid.*, pp. 1036-8.

⁷³ People who 'render themselves criminal in the sight of Almighty god by rash attempts on their own persons should experience also that punishment in this world which their temerity deserves.' *Ibid.*, p. 1038. Cf. *HSM*, II, p. 187, for Duncan's earlier order of 7 March 1788, declaring that if a person committed suicide against judicial or other proceedings, his body would not be buried if he was a Muslim and he would be denied the funeral customs of his caste if he was a Hindu.

⁷⁴ The amils usually tried, as before, to have the body disposed of in the

⁶⁵ RB to GG in C, 26 April 1789, BRC P/51/38, 17 June 1789, p. 1527.

⁶⁶ *Ibid.*, pp. 1504, 1507.

⁶⁷ E. Balfour, *The Cyclopaedia of India and of Eastern and Southern Asia*, Third edition, vol. III, p. 45.

⁶⁸ Neil Rabinoy, 'Administrative modernisation and the Bhats of Gujarat, 1800-1820', *IESHR*, XI, 1 (March 1974), pp. 46-74.

⁶⁹ Forbes, *Oriental memoirs*, 1813, II, pp. 89-93. Cf. *Mirat*, for a similar protest threatened by Brahmins against the imposition of a tax on the sale on houses, pp. 535-6.

The punishment suggested by the Banaras raja was restricted to the confiscation of goods and banishment. It was Duncan who added the threat of ritual deprivation as well, to reverse the pressure exercised over the disposal of the body, and to shift attention away from the sin of causing a Brahmin to shed his blood towards the sin of suicide. Moreover, the raja had suggested punishment only when such acts were directed against the orders of government. Duncan made it clear that these practices could not be allowed to continue in *any* context. What was being attempted by the Company was a shift in civilizational values of the sort which Elias described for the movement from feudalism to absolutism in Europe. 'When society was less interdependent the social power maintaining each claim by an individual had to be fairly directly visible.'⁷⁵ Elias went on to analyse the factors responsible for the gradual centralization of force which began to create 'pacified social spaces' within which unarmed men were forced to restrain their own violence through foresight and reflection.⁷⁶ In North India, the institution of civil authority involved an effort to change that brahmanical 'Spirit of pride and Revenge' which seemed to animate dharna and kurh, as well as those notions of *hoormut* (esteem), which seemed to structure the resistance of Rajput coparcenary communities to the revenue collector. Duncan discovered female infanticide among the Rajkumar Rajputs of Jaunpur at a time when they were locked in a fierce struggle for autonomy against the powerful revenue farmer, Sheo Lal Dube.⁷⁷ From his perspective female infanticide seemed to nurture that spirit of *hoormut* which made the Rajkumars so ready to take to

customary way to quieten things down. But Duncan made a similar threat in the case of one Sheo Lall, a Brahmin sentenced to life confinement for murder, who was threatening to starve himself to death if he was not released. Sheo Lall was told that if he died, his body would not be given the usual funeral rites, but would be disposed of 'as one who had lost cast'. Resident's progs, 24 October 1790, DR, Basta 7, No. 41, RAA.

⁷⁵ Norbert Elias, *State formation and civilisation*, 1939, reprint, 1982, pp. 233-4, 238-9, 347-8, n. 49.

⁷⁶ Ibid.

⁷⁷ Holding lands on both sides of the border between Awadh and the Banaras zamindari, Duncan described them as 'scarcely owing any allegiance, either to the Nabob's or our own Government, and always ready to betake themselves to arms . . .' RB to GG in C, 26 April 1789, *Papers relating to East India affairs*, vol. 1, 1821-1830, p. 5.

violence, for 'what can be expected of men inured as they are from birth and education to the most atrocious deeds.'⁷⁸

However the point of awkwardness for the Company was that protection for the sacred city and patronage for brahmanical learning were difficult to disentangle from the sacredness of the brahmanical person.⁷⁹ Another problem was that the Banaras rajas had set a certain precedent in exempting Brahmins from the death penalty. Duncan was clearly unwilling to press the issue of 'regular and impartial justice' to the point where the sin of shedding Brahmin blood might indeed discredit the Company.

The key case was that of Beechuk Brahmin of pargana Kantit, who beheaded his mother when his opponents did not return some money which he said they had taken by force.⁸⁰ It was at this point, in July 1789, that the resident issued the Governor General's proclamation declaring that those who murdered or threatened to murder 'aged females' for any grievance would in future be tried for murder and sentenced to death. In addition, the criminal's family would be banished from the Raj and from the Company's domains, and their land given to other subjects, 'who thankful for the happiness they enjoy under British Government, repair to the resident, or Raja or the court of justice for redress.'⁸¹ The extension of punishment to other members of the household was an acknowledgement that family interest was marshalled behind the homicide.

In questioning some Brahmins of pargana Kantit who were present at the trial, the resident sought to focus on the act of beheading rather than on the contest over rights and claims within which Beechuk had justified his action. Duncan asked Byjoo Debey, of the party in conflict with Beechuk, whether it was an

⁷⁸ RB to GG in C, 2 October 1789, BRC P/51/49, 21 October 1789, pp. 181-2. Some thirty years later a magistrate of Jaunpur echoed this correlation: 'the practice of infanticide is indirectly a very considerable cause of the insubordinate character and violent disposition of the Rajkoomars, as it teaches them early to steel their hearts against the natural affections; and renders them familiar with inhumanity.' Magt Jaunpur to SP, WP, 5 May 1819, BCJ 30 July 1819, No. 21, in *Papers relating to East India affairs*, vol. 1, pp. 15-16.

⁷⁹ Duncan had set up a Sanskrit college in a conscious bid to emulate princely patronage for brahmanical learning at Banaras.

⁸⁰ RB to GG in C, 2 October 1789, RB P/51/49, 21 October 1789, pp. 186-90.

⁸¹ Ibid., pp. 770-2.

act of merit or shame to cut off one's mother's head. He replied that it was a crime, but that 'to lay hands on oneself is not so bad.'⁸² The resident then put the question to Kashinath, the pandit of his court: 'According to the Bedes and the Shaster is it a crime, or a merit for a man to kill his mother and what issues from such an act both here and hereafter?' Kashinath said it was an enormous crime and the offender lost his caste and received *narakh* in his next life. Beechuk protested 'How can that be criminal which is so often practised?'. The criminality of the act, he said, would fall on his adversary. However, Byjoo offered the example of his cousin, Ram Jewan, who had killed his mother to press a dispute, and was outcasted.⁸³ But Duncan chose to focus on the exposition given by Kashinath, describing the ignorance of the brothers about the penalty of outcasting 'till they heard that Doom pronounced against them in the public cutcherry by a very learned Pundit.'⁸⁴ Though they were Brahmins, yet they were 'as little informed and as full of prejudices as the meanest peasantry in any country can be.'⁸⁵ By reference to the shastras, as expounded by a learned Brahmin, Duncan hoped he had found a way to counter the 'superstitious' dread which allowed an illiterate one to resist the revenue collector or other adversary.⁸⁶

The proclamation of July 1789 upheld official agency as the only legitimate channel of redress; but by equating *kurh* with all other acts of murder it also stressed the idea of a regular retributive mechanism operating without reference to the status of the offender. Duncan had introduced permanent public gallows to the landscape of Banaras, to remind people that justice would proceed inexorably against the crime of murder.⁸⁷ But what effect would the public hanging of a Brahmin at Banaras have for the Company's image as protector of the Hindu religion?

⁸² Beechuk however insisted that it was 'not a crime for people when in great extremities to kill their mother and such is the idea of his *pergunnah*.' Ibid., pp. 811-18.

⁸³ Ibid. Evidently there were differences of opinion within their community about the propriety of killing a female to claim justice, though not about inflicting death or injury on oneself.

⁸⁴ Ibid., pp. 192-3.

⁸⁵ Ibid.

⁸⁶ Reg 21, 1795 formulated to prohibit *dharna* and *kurh* described them as practices adopted 'by some of the more unlearned part of the Brahmins.'

⁸⁷ RB to GG in C, 14 January 1789, BRC P/51/32, 4 February 1789, p. 173.

The case which aroused Duncan's misgivings was what might be termed an ordinary homicide, in which a Mahabrahmin, Bhowanny Buksh, had strangled a boy of the same caste.⁸⁸ One Soobode Kwyre had been the first offender sentenced to death for a case of strangling and the first to be executed on the public gallows set up by Duncan.⁸⁹ But was Bhowanny Buksh, Mahabrahmin, to receive the same punishment?⁹⁰ Kashinath was consulted again, but this 'very learned pandit' stated that the shastras did not permit a Brahmin to be put to death. However, he could be punished by shaving his head, 'drawing' the figure of a headless man on his forehead, confiscating his property, and banishment.⁹¹ So Duncan argued that the execution of Bhowanny Buksh would be inexpedient,⁹² and the Board agreed to make an exception, permitting the shastraic punishments instead.⁹³ Bhowanny Buksh

⁸⁸ The Mahabrahmins were a Brahmin sub-caste who presided over funeral ceremonies. Duncan had been trying to secure capital punishment for strangling by insisting on the application of the legal school of Yusuf and Muhammad rather than that of Abu Hanifa.

⁸⁹ The execution took place on 23 December 1789. RB to GG in C, 14 January 1789, BRC P/51/32, 4 February 1789, p. 173. The offender was probably a Koeri by caste, a market-gardening community.

⁹⁰ Extract from progs of RB, 18 October 1788, RB to GG in C, 10 November 1788, BRC P/51/27, 28 November 1788, p. 531; RB to GG in C, 14 January 1789, BRC P/51/32, 4 February 1789, p. 173. Fort William had sanctioned the death sentence, but the resident said further enquiry was necessary 'where the justice of the Company was involved with a character as sacred as that of a Brahmin'. RB to GG in C, 14 January 1789, *ibid.*, p. 183.

⁹¹ RB to GG in C, 22 October 1788, BRC P/51/27, 1 December 1788, pp. 641-76.

⁹² RB to GG in C, 14 January 1789, BRC P/51/32, 4 February 1789, pp. 185-8. Duncan referred to Halhed's *Code of the Gentoo Laws*, but this had not barred the execution of Brahmins elsewhere in the Bengal Presidency. In the Bombay Presidency where Maratha chiefs had observed Shastraic injunctions against executing Brahmins and women, the Company exempted them from capital punishment but subsequently withdrew this concession.

⁹³ The resident was to explain this as a concession given out of regard for the Hindu religion and to state that in future a Brahmin convicted of murder would be sentenced to death. GG in C to RB, 4 February 1789, BRC P/51/32, 4 February 1789, pp. 433-4. Duncan read out these orders to an assembly of Brahmins at his *kachcheri* who 'seemed not to disapprove' though one of them said that there were some less criminal forms of homicide for which an express mode of expiation had been laid down. *HSM*, II, pp. 188-9. This assembly of notables on an important issue seems to resemble pre-colonial forms of consultation, but here the Brahmin *parisad* was being informed of a new principle of rule, not being asked to expound on it.

was tonsured, a headless figure was tattooed on his forehead, and he was expelled from the Company's domains.⁹⁴ Duncan was still hesitant about ordering the death penalty for Brahmin offenders, seeking to use the weapon of social disgrace instead by drawing upon the shastras.⁹⁵ But in another case where two Brahmins strangled a boy, he discovered that by a strict exposition the degree of punishment would vary according to the caste of the victim as well. Since the victim was not a Brahmin, the two culprits would only have their heads shaved and be banished. Evidently it was the idea of a permanent stigma, the tattoo on the Brahmin's forehead, which had deterrent value for Duncan.⁹⁶

It was in this case that the resident suggested transportation for life for Brahmins as a substitute for the death penalty. Transportation, Duncan wrote, would inspire the terror of 'a real banishment' and would not be found contrary to the Hindu law.⁹⁷ He could have chosen another way out of his dilemma: he could have substituted capital sentence with imprisonment for life, as he had done in cases of murder where the Muslim law officers had not given a fatwa of *kisas* (retaliation). Clearly, Duncan thought he had found another way of reversing the thrust of religious terror.⁹⁸ Being 'carried over the water' was a punishment strongly recommended by Company officials because they believed it inspired the additional terror of losing caste.⁹⁹ The resident may have also found transportation a specially useful punishment at this point

⁹⁴ According to one interpretation, the figure could only be drawn on the forehead because of the prohibition against wounding a Brahmin. But the process eventually used was that of *godna* (tattooing), a punishment which eventually began to be used on all offenders sentenced for life.

⁹⁵ RB to GG in C, 22 June 1790, BC F/4/520, pp. 188, 213-14.

⁹⁶ RB to Sub-Secy, 21 September 1790, BC F/4/520, pp. 213-14.

⁹⁷ Ibid.

⁹⁸ Duncan announced this decision in a proclamation of 28 December 1790. RB to Sub Secy, 28 December 1790, BRJ P/127/72, 7 January 1791.

⁹⁹ Cf. answers of judges to GG's interrogatory, 1801, Question 37, PP, 1812-13, vol. 9. The new rulers presumed they had a knowledge of geography far beyond that of their subjects, for whom transportation was supposed to carry the terrors of the void. Yet Tamil sailors had been visiting the island of Penang, the site of transportation, for a trade in betel nuts before Francis Light negotiated its lease for the Company in 1786. Major A.G. Harfield, 'Fort Cornwallis, Pulo Pinang' in *Journal of the Society for Army Historical Research*, vol. LX, Summer 1982, No. 242, pp. 78-90. Cf. also F.B. Solvyns, *Les Hindous*, III, 1811, p. 2.

because some Brahmins had gone on a fast for their release from jail. Duncan declared that he would promote the regular process of justice even if they starved themselves to death, for

were this artifice or Expedient of theirs to be yielded to, there would soon be an End in this country to all the Judicial or other Coercive authority of Government . . . the mode is one of the Common means by which the Brahmins of this country have long kept themselves above all Rule whatsoever but now that they and others find the Law of the Land operating on them, it is a novelty and restraint which they cannot consider but as a great hardship.¹⁰⁰

The substitution of transportation for capital punishment therefore marked the outer limit of the concession to Brahminical status in the law relating to homicide, and this exception was limited to the Banaras Zamindari.¹⁰¹

For the Company's government the objectionable feature about dharna, as with *kurh*, was that it could invoke a field of authority which might rival the courts of law and challenge the justice of their decisions.¹⁰² In November 1792, Duncan proclaimed that anyone on dharna for the payment of a debt or any other complaint would have his claim dismissed and be banished from the Banaras Raj.¹⁰³

¹⁰⁰ RB to GG in C, 10 August 1790, BRC P/52/17, 25 August 1790, pp. 832-3.

¹⁰¹ The exemption of Brahmins of the Banaras Zamindari from capital punishment was abolished by Reg 17 of 1817, though they were not to be executed within the city. This measure provided a useful precedent for prohibiting a practice, even if it had the sanction of the 'Hindu law'. Cf. Bentinck's 'Minute on sati'; also Solicitor General in Privy Council, arguing that the Company did have the legal power to abolish sati, 2 July 1832, in *Progressive movements*, pp. 143, 196.

¹⁰² As in the case of Beeno Bye, a Brahmin widow, who sat down in dharna before her brother-in-law, because she wanted him to pay off her debts. The brother-in-law appealed in vain to the *adalat*. They fasted against each other in a temple, at the end of which the brother-in-law signed an agreement about the terms on which he would pay her. RB to GG in C, 11 October 1792, DR, Basta 11, No. 63, RAA. Duncan explained that sometimes even the Banaras *adalat* or the residency could not do anything to remove people sitting on dharna, because seeing the government peon they would threaten to injure themselves: 'in such Cases, it is thought prudent to forbear to remove them by force, for to Government itself the Discredit would not be small at Benares, to be even the remote or indirect Cause of the death of a Brahmin.' Ibid.

¹⁰³ Order of GG in C, 2 November 1792, RB to GG in C, 24 October 1794, BCRJ P/128/15, 7 November 1794, pp. 638-9. The earlier order of July

This prohibition was formally incorporated into Regulation 21 of 1795.¹⁰⁴ It was the connotation of sin and moral censure evoked by a Brahmin sitting on dharna which was at issue here, not mere dunning.¹⁰⁵ But how was one to establish that the threat of religious retribution had been marshalled? The problem was one of reducing a shared code of meanings to a fixed set of criteria. Regulation 21 of 1795 instructed the pandits of the court to declare whether the offence was established *according to the shastras*,¹⁰⁶ but soon after, Regulation 8 of 1799 directed them 'to regard the common construction of that term and practice' as well.¹⁰⁷

This form of 'claiming justice' was therefore defined as a criminal offence in colonial law. Yet it is interesting that, when the suicide or the homicide was directed against an Indian ruler, a British functionary could still acknowledge it as a form of resisting oppression. The assistant agent at Bundelkhand reported that Raja Bakht Singh wanted him to issue a notice against Rajputs destroying female infants and Brahmins destroying females of their family. However, he suspected that the Raja would use it for his own ends because the latter was the main way by which the violence of chieftains was held in check.¹⁰⁸ What worried the magistrate of Mirzapur about the high rates of suicide in pargana Bhadohi, in the family domains of the Banaras raja, was that only half of these were committed by women. 'We all know that women in India jump

1789 had made the threat of self-injury an offence when it was used to obstruct revenue collection. Now dharna was prohibited in any context.

¹⁰⁴ Harington said dharna was made illegal because it was 'open to abuse' and could become the means of 'undue exaction'. *Elementary analysis*, I, p. 338.

¹⁰⁵ Reg 21 of 1795 described dharna and kurh as offences specific to Brahmins in the Banaras province. Subsequently however, these provisions were applied to all forms of dunning and from the 1840s other forms of putting pressure for charity were also prohibited. The extent to which these provisions were enforced is a different question, but plaintiffs did use the courts sometimes to get a dharna lifted.

¹⁰⁶ They were asked to do so even though the modes of duress to recover a debt were not described as an offence in the shastras and even though the Banaras pandits had disagreed on whether dharna could be correlated with these shastraic descriptions. Report from Fukheruddin, judge of the Mulki Faujdari Adalat, in RB to GG in C, 24 October 1794, BCrJ P/128/15, 7 November 1794, pp. 640-5 and RB's progs, 28 March 1794, *ibid.*, pp. 671-82.

¹⁰⁷ BCrJ P/128/43, 10 October 1799, No. 29. In addition the offence was now cognizable against everyone not just against Brahmins.

¹⁰⁸ Asst Agent Bundelkhand to GG, 25 January 1824, BC F/4/984, 1828-29

down wells . . . for very *trivial domestic reasons*, but where men take to this mode of avenging themselves, there is generally oppression or extortion at the bottom, and despair at obtaining justice . . .'¹⁰⁹ The statement also reveals that there was another context in which suicide could assume the form of a protest against injustice but was not dignified with this presumption.¹¹⁰ This was where some woman committed suicide, or killed one of her children, not on behalf of her family or to follow her husband into death, but to protest some wrong done to her by these very parties.¹¹¹

The Law on Homicide and the 'Will' of the Victim

In assessing the structures of belief and authority underpinning kurh, Duncan reported that

The males who are in such Cases the parties more immediately liable to suffer by the oppressions real or supposed that may threaten do seldom make any attempt on their own Lives but avail themselves of their Power over the females of their family, and of the Prejudices entertained by the latter to render them in manner willing sacrifices to their own Notions of Honor and Security.¹¹²

In prohibiting the practice therefore the Company had to take

¹⁰⁹ *Report of the police administration in the North Western Provinces for the year 1862*, Allahabad, 1863, p. 43, para 210 (emphasis added). This diatribe was directed against the Raja of Banaras, whose powers as revenue collector and civil judge in his Family Domains in Bhadohi were an irritant to the British magistrate.

¹¹⁰ That is, by colonial officials and also by their male informants. See chapter four for more details on the official attitude to female suicide and towards female victims of 'domestic' violence.

¹¹¹ The judge of Tipperah referred to suicide being very prevalent among 'the lower class of women' from some 'trifling dispute or for being reprimanded for neglect of household duty by the husband.' 23 April 1802, *PP*, 1812-13, p. 122. Cf. case of Mussumaut Burræe who killed her daughter because of abuse from her husband. The judge of the Court of Circuit recommended mercy saying she had done so in a state of frenzy, but the Nizamut Adalat sentenced her to death. *NAR*, II, pp. 27-8. Musst Munjoo who cut her child's throat when her husband forced her to return on her way to her father's house, was also given the death sentence. *Ibid.*, pp. 146-7. In both these cases the mitigating formula of derangement, frenzy or of lack of pre-meditation was rejected. Nor does any assertion of the mother's authority over her children leave its trace on the reports, whereas the father's assertion was often recorded.

¹¹² RB to GG in C, BRC P/51/38, 17 June 1789, pp. 1562-3.

into account not only the force of patriarchy but also the 'prejudices' or 'superstitious beliefs' of the victim, which seemed to draw acquiescence in her own death. However, the other dimension of 'consent' lay in the selection of the person who would uphold family honour. The men who had been insulted, and various other members of the family, would offer to wound or stab themselves, but someone or something would prevent them. The offer eventually acted upon would be that of an old woman or widow, or the choice would fall on a female infant. The victim was usually therefore that female with the most marginal role in the family, whether in terms of her capacity to labour, her reproductive potential, or her cultural value to the lineage. Family members might expound upon the eagerness of the adult female to give up her life, but in the case of the female child the assertion was entirely that of paternal right, not choice. Dhunoo Chamar, when questioned by the resident as to why he had killed his four-year-old daughter to avenge a grievance replied: 'This little girl belongs to me. It was God's will that she should be killed.'¹¹³ The roll of the dice against the most marginal is indicated in Hari Tewari's account of the death of his wife. His family had been told, wrongly as it turned out, that he had died from a beating by the amil's agents:

a nephew of mine . . . gave intelligence at my house that Hurry was dead. My elder brother . . . said, 'since Hurry is dead what signifies my life?' He looked for a knife to rip open his belly, but as there was no knife in the house, he went into a barber's shop and getting a razor, wanted to rip open his belly. The women coming, took the razor out of his hands, saying they would burn themselves; but why should he, who was a chief or head man throw away his life, when one chief or head had already been killed? My brother's wife went into the house and set fire to it, saying she would burn . . . [she] fell from the ladder on the ground; Deo Dutt and another person . . . took her away. [Finally, Hurry's wife appeared on the scene and was told by her brother-in-law that her husband had been killed.] On hearing this, she said, 'since my husband has been killed, of what use is life to me? I also will die.'¹¹⁴

¹¹³ RB to GG in C, 12 September 1794, BCrJ P/128/14, 26 September 1794, p. 920. Yet if we look closely at the following accounts of kurhi, the woman seems to sacrifice herself, not only from wifely devotion, but with an awareness of her marginal status should her husband die instead.

¹¹⁴ Progs of RB, 9 December 1788, PP, 1821, vol. 18, p. 311. The great vulnerability of the widow to such pressure is also evident in the case where

In the version given by the revenue collector, the pressure exerted on the widow is far more brutally summarized. Hari's brother is said to have told her, 'He has killed your husband, why are you alive?' and to have pushed her into the burning house.¹¹⁵ Hari eulogized his wife for the willingness she had shown to sacrifice herself on an earlier occasion as well. He had wanted to kill himself; but his wife had asked that she might die instead, for he could get another wife, but not she another husband.¹¹⁶ The dispensability of the old and helpless woman was such that Duncan was told that in Kantit the Brahmins 'even borrow from each other aged females to be the victims, the Borrower . . . promising to repay . . .'¹¹⁷

Two provisions of the Islamic law had to be amended to put such reproach killings on the same footing as wilful murder: the provision which barred capital punishment if someone had killed another at the latter's express desire,¹¹⁸ and that which barred it if the slayer stood in a parental relation to the deceased. In defining this practice as murder the Company claimed to be protecting the more helpless of its subjects 'from the effects of passion and revenge'. But it also enunciated the principle that the victim's consent or free will could not constitute grounds for an exemption from capital sentence. Section 3 of regulation 8, 1799, made this clear. Hereafter it would 'not justify any prisoner convicted of wilful homicide that he or she was desired by the party slain to put him or her to death.' The person convicted would be sentenced to death:

whatever may be the fatwa of the law officers under the Mohumudan Law which . . . although it withholds Kisas, gives a full latitude to the magistrate in the discretionary punishment or (of?) Tazeer or Seeasut; and experience has shown the necessity of inflicting the punishment of murder in such cases to preserve the lives of many from the effects of passion and revenge aided (especially in the province of Benares) by the erroneous prejudices of superstition.¹¹⁹

one Soodishter intended to cut off his wife's head to protest a revenue summons, but his widowed daughter was said to have requested him to decapitate her instead. Shore 'On some extraordinary facts', p. 336.

¹¹⁵ Progs of RB, 9 December 1788, PP, 1821, vol. 18, p. 302.

¹¹⁶ Ibid., p. 301.

¹¹⁷ RB to GG in C, 26 April 1789, P/51/38, 17 June 1789, p. 1566.

¹¹⁸ *Elementary analysis*, 1, part II, p. 249, para 9.

¹¹⁹ Ibid., vol. 1, p. 314 (emphasis added). *Tazir*: discretionary punishment

The issue in law here was not the voluntariness or otherwise of the killing but of making criminal every spectacle which suggested a rival claim over the life of one of the Company's subjects. The only authority which was to remain visible in the matter was the one which stood behind the public gallows.

But there were instances in which the taking of one's own life and the ritual assistance of others in this was given an undefined measure of 'tolerance' by the Company's government, which it justified by reference to ancient practice, religious belief or the sanction of religious text. These included the practices by which a person in old age sometimes drowned himself at a sacred place, or a leper had himself buried alive or drowned. The other instance was of the widow who burnt herself on her husband's funeral pyre. By controlling the time and mode of death a person could perform all the rites of purification and choose the most pure spot at which to die. This procedure was supposed to vest the person with power over the afterlife. These acts were not regarded with the horror of the ordinary suicide, nor was assistance in such death regarded a sin.¹²⁰ Leprosy was commonly held to be the result of some sin.¹²¹ Putting oneself to death was supposed to expiate the sin and root out the disease from the family.¹²²

The widow who immolated herself was supposed to be charged with divine power. Spectators gathered the flowers or cowries she scattered on her way, as touched by that power.¹²³ '[A] sort of pride attaches to the performance of the ceremony', observed the judges of the Nizamat Adalat, 'and the women are taught from infancy to believe . . . they perform an act . . . that will redound to their own credit and raise the reputation of their

for the correction of the offender; *siyasat*: discretionary punishment extending to death.

¹²⁰ Cf. Introduction in M. Bloch and J. Parry (ed.), *Death and the regeneration of life*, 1982, p. 15.

¹²¹ Buchanan-Hamilton, 'An account of the northern part of the district of Gorakhpur', Mss Eur D. 91, p. 18, IOL. Heber *Narrative of a journey*, 1, p. 152.

¹²² Extract from report of criminal cases adjudged by NA, 1810, PP, 1821, vol. 18, p. 320. This belief was shared by Muslims. See case of Badul Khan, *ibid.*, p. 319. Of course the choice of suicide was also shaped by the social stigma of the disease and the reintegration of the family to the community once the leper removed himself.

¹²³ F. Parkes, *Wanderings of a pilgrim*, 1850, reprint, 1975, 1, p. 95.

families.¹²⁴ Sati seems to have been more of a public spectacle than these other rites of suicide, and colonial law and magistracy came to be drawn into it.

Initially, the Company tried to avoid any definite statement on the issue. Magistrates were warned not to interfere in voluntary satis except by the use of personal influence.¹²⁵ But the very logic of its own legal order, the way in which the colonial state extended its legal claims over the person of its subjects, meant that the 'voluntariness' or otherwise of the rite pressed itself upon the British magistrate. In the Bengal districts people often sought police permission for the rite, though the Company had issued no official circular or regulation requiring this.¹²⁶ Magistrates and judges were uncomfortable about seeming to condone what some of them termed 'human sacrifice', especially when the policy on the victim's consent was so hazy. Their demands for specific instructions put pressure on the government to define the extent of its toleration.¹²⁷

In 1810 the Nizamat Adalat confirmed the position that Hindus could assist the aged or those afflicted with leprosy to end their lives if it was a voluntary act, because the practice had the sanction of the shastras.¹²⁸ However, Muslims would not be exempted from

¹²⁴ Remarks and orders of the NA on sati reports of 1821, Home Misc. 540, pp. 181-2. As Lata Mani points out, the subjectivity of the woman who said she would burn herself was a complex and shifting one. 'Production of an official discourse.' Admittedly too, with the death of the woman, narrative authority is handed over to other people. Even so, belief-systems are one of those factors which shape subjectivity.

¹²⁵ Cf. BRC 4 February 1789, in PP, 1821, vol. 18, p. 31.

¹²⁶ Mughal hakims had sometimes demanded that permission be taken for any rite of suicide, but had not withheld their consent. Sushil Chaudhuri, 'Sati as a social institution and the Mughals', *Indian history congress*, 37th session, 1976, pp. 218-23. Anjali Chatterjee, *Bengal in the reign of Aurangzeb*, 1967, p. 221. In Ghazipur and Shahabad, where the incidence of sati was comparable to some of the Bengal districts, the ceremony was usually performed without giving notice. The Nizamat Adalat observed that here 'the inhabitants seemed determined to exclude the interference of the police.' Remarks and orders of the NA on sati reports of 1822, Home Misc. 540, pp. 712-13, 722-3. In one case the girl's relations applied in confidence to the darogha, explaining that she was being forced to burn but that they could not interfere publicly. Actg Magt, Bihar to Secy, Judl Dept, 4 January 1805, PP, 1821, vol. 18, p. 317.

¹²⁷ See PP, 1821, vol. 18, pp. 316-18, 324.

¹²⁸ Cf. case of Sohawan, submitted to the NA on 7 August 1810, *ibid.*

prosecution because there was no such sanction in Islamic law.¹²⁹ In the case of sati, the Nizamat Adalat, through the procedure of putting questions to its pandits in 1805, declared that the practice was founded on the religious notions of the Hindus and expressly approved in their laws. It stated that sati was forbidden if it was not voluntary, and also under certain other conditions.¹³⁰ But it was only much later, after further questions to its pandits, that on 29 April 1813 the Nizamat Adalat issued a circular for the guidance of magistrates and the police.¹³¹ By citing criteria from the shastras, the government framed its intervention in the rite as an endeavour to ensure that only those satis took place which were truly permitted by the Hindu religion. This strategy, based on drawing distinctions between 'true religion' and benighted custom, would prove a serious embarrassment subsequently, when government sought to abolish sati altogether.

The purpose of this bureaucratic rendering of textual injunction was to restrict the rite, and colonial red tape began to entwine it in a peculiar way. The widow with children under three was not to commit sati until some person undertook responsibility for their maintenance in 'a written engagement in duplicate on stamped paper and according to the following form . . . and duly attested . . .'.¹³² More importantly, textual injunction was interpreted to elaborate the criteria by which the free-will of the widow was assessed. The pandits of the superior court had declared that the widow was supposed to have reached puberty. Using this, government fixed the minimum age for the performance of sati at sixteen. Whereas in other instances, the age of responsibility in the criminal law was tied to the physical changes of puberty,¹³³ with sati the age was linked to maturity of judgement.¹³⁴

¹²⁹ Ibid., pp. 318–19. The colonial judicial order therefore not only built its own version of a scripturally based religion, but defined sharper community distinctions in doing so.

¹³⁰ Actg Regr, NA to Secy, Judl Dept, 5 June 1805, *ibid.*, pp. 321–3.

¹³¹ Ibid., pp. 331–2.

¹³² BCrJ 21 March 1815, No. 20, *PP*, 1821, vol. 18, p. 336.

¹³³ For instance, the age below which sexual intercourse with a female, with or without her consent, was punishable as rape was as low as ten, and, in the Presidency towns, eight.

¹³⁴ Cf. Actg Regr, NA to Secy, Judl Dept, 5 June 1805, *ibid.*, pp. 312–37.

The issue of the woman's consent figured prominently in the debate over further measures to restrict the rite. Some judicial officers, such as J.H. Harington and E. Watson, stressed that the toleration extended to sati was a legal anomaly since section 3 of Regulation 8, 1799, stated clearly that the consent of the party slain did not absolve the killer.¹³⁵ However, the Nizamat Adalat did not accept this interpretation of the legal position. It held that there was a difference between a woman burning herself or causing herself to be burnt and the murder of another person, and that neither the 'authorised self-devotion of the suttee' nor the assistance given by Hindus to the suicide of a leper were within the scope of Regulation 8, because these had the sanction of the shastras.¹³⁶ That provision, it stated, was intended to preserve lives against the force of superstition. By implication therefore the sati, so far as it was authorized by the shastras, was a part of religion and could not be the subject of a criminal prosecution.¹³⁷

However, the problem for the Company's government was that while it did not wish to seem in opposition to religious aspirations, it did not want its monitoring of the rite to be interpreted as an endorsement of it. The difficulty of charting this course is evident in the uncertainty surrounding the prosecution of an irregular sati. The most striking instance of this is that police officers were directed to attend satis, but there was no order or regulation obliging people to inform them of the ceremony, or even to ask permission for it. In fact the circular of 29 April 1813 specifically instructs police officers to let people know that

it is not the intention of government to check or forbid any acts authorised by the tenets of the religion of the inhabitants of their dominions, or even to require that any express leave or prohibition be required, previously to the performance of the act of 'suttee'.¹³⁸

¹³⁵ *Elementary analysis*, 1, p. 314. Watson proposed that section 3 of Regulation 8, 1799 be used to declare that all persons assisting in the rite of sati were guilty of murder. If sati and the burying of lepers were to be 'countenanced' then an express legislative enactment was necessary. E. Watson to Regr, NA, 16 April 1818, *PP*, 1821, vol. 18, p. 393.

¹³⁶ Extract from progs of NA, 25 June 1817, *PP*, 1821, vol. 18, pp. 403–5.

¹³⁷ Ibid., p. 405.

¹³⁸ BCrJ 17 April 1813, in *PP*, 1821, vol. 18, pp. 326–7 (emphasis added). Bishop Heber noted the 'singular omission' that no punishment had been prescribed for failure to give notice of a sati. Entry of 31 August 1824, in M.A. Laird (ed.), *British Heber in North India*, 1971, p. 126.

This position was either not assimilated by magistrates or ignored by them, because they often used their summary powers to punish failure to give notice.¹³⁹ European writers who described the rite were usually under the impression that it was necessary to take the permission of the judge or the magistrate, and the proceedings of the parties to a sati in the Bengal districts indicate that they thought so too.¹⁴⁰

So, on what count could a party be prosecuted for having assisted at an 'illegal' sati? One of the criteria in the circulars of 1813, and of 21 March 1815, was whether it was a voluntary immolation. But there were other prohibitions interpreted from the pandits' *vywasthas*: the woman must not be pregnant; if she was a Brahmin she was not allowed to perform the rite by *anumaran*, that is to burn without her husband's corpse; if she had children under three, someone had to give an undertaking to support them. Could people be prosecuted for a sati which was 'voluntary' but had violated these other criteria? Apparently not, for when the magistrate of Moradabad committed the relatives of Mya Koowar to trial because she had performed the rite by *anumaran* despite being a Brahmin, the Nizamat Adalat said he should not have done this as the act had been voluntary. The magistrate was asked to specify the offence with which her relatives were charged.¹⁴¹ What was 'illegal' or irregular by the terms of the circulars was therefore, not punishable by any formal regulation.¹⁴² So, efforts to ensure that irregular sats did not take place depended heavily on police vigilance.¹⁴³ Even in the few cases of forcible sati

¹³⁹ In 1818 the Nizamat Adalat had to declare that the practice in Shahabad of punishing landholders and relatives for not giving prior information to the police was unauthorized. BC P/4/1818, 1825-26, pp. 52-3, 59. In 1822 it again had to remind magistrates that the performance of the ceremony before the darogha's arrival was not a criminal offence. Report of NA on satis performed in 1821, BCJ 15 August 1822, Nos 9 and 13; Home Misc. 540, p. 92. Cf. also case of Mungul Rai and three others charged with assisting at a sati without giving notice to the police. Mungul was released as the judges of the Nizamat Adalat said that no such orders existed. NAR, II, pp. 179-80.

¹⁴⁰ Cf. J. Statham, *Indian recollections*, 1832, pp. 129-32.

¹⁴¹ Report of NA on satis performed in 1821, BCJ, 15 August 1822, Nos 9 and 12; Home Misc. 540, p. 157. *Vywasthas*: legal expositions.

¹⁴² In addition, as Watson pointed out, there was no provision for fixing or enforcing the maintenance for infant children. E. Watson, in progs of NA, 25 June 1817, PP, 1821, vol. 18, pp. 400-1.

¹⁴³ The government gave considerable weight to the collection of statistics

which were prosecuted, the culprits were usually found guilty of the mitigated offence of culpable rather than wilful homicide. In their statements the judges made allowances for the 'superstitious prejudice' or 'erroneous belief' of the prisoners that they were merely expediting the completion of a religious ceremony.¹⁴⁴

The first such case which came to trial in the Bengal Presidency concerned the tortured fate of a fourteen-year old Brahmin widow, Homulia, whose initial decision to burn herself was reported to have been voluntary. Once the pile was fired, she jumped off, only to be thrown back on it by her relations, Sheolal and Bichook. When Homulia sprang off again in agony, she was tied up into a cloth and lifted back onto the pyre. The flames consumed the cloth, she struggled once again, until, at the prompting of some spectators, Buraichee, a Muslim, cut her throat with a sword.¹⁴⁵ The judges of the Banaras Court of Circuit convicted Sheolal, Bichook and Buraichee of wilful murder, but sent the case up to the Nizamat Adalat. This court viewed it as an instance of culpable rather than wilful homicide, making allowances for the 'superstitious prejudice' of the Hindus and the 'ignorance' of the Muslim.¹⁴⁶

In 1817, to close this gap between the permissible sati as outlined in the circulars and *vywasthas*, and the legal authority to prosecute for violations, the Nizamat Adalat drafted a regulation 'for maintaining the observance of the restrictions prescribed by

of the rite, and the Nizamat Adalat checked the reports annually to ensure that the police were enforcing the criteria for the permissible sati.

¹⁴⁴ Rajub Sothee, who had pushed a woman further into the pyre, was released. 'I am not aware', wrote the magistrate, 'that he was guilty of any legal crime, his object seems to have been merely to expedite the ceremony . . .'. But the Nizamat Adalat held that Rajub should have been punished for a misdemeanour. Report of NA, 15 August 1822, Home Misc. 540. A Poona magistrate found two Brahmins guilty of killing a woman who had sought to escape from the pyre, but released them. He explained the leniency of the court in this first sati trial there to the fact that it could not 'precisely balance between the degree of guilt for an intention to kill and that of merely a desire to finish a sacrifice . . .'. Trial of Chinto Ramchunder Muhuskur and others, 10 November 1823, Judl Dept. vol. 19/80, 1824, pp. 357, 382, MSA. A misdemeanour implied an offence for which no specific punishment had been designated, but which the magistrate could punish under his general powers.

¹⁴⁵ Extract BCJ, WP, 17 August 1821, No. 28, BC F/4/818, 1825-26.

¹⁴⁶ Ibid. Culpable homicide was punishable by terms of imprisonment with or without labour. Wilful homicide could bring a sentence of death.

the shaster in the burning of Hindu widows.¹⁴⁷ But the Vice-President in Council advised against a legal enactment, suggesting another set of circular orders for the police instead.¹⁴⁸ The Bengal Council withheld even these circular orders, under the apprehension that the circulars already in force and 'the continual agitation of the question' might have contributed to an increase in the number of satis performed between 1815 and 1818.¹⁴⁹ Government was therefore beset with anxiety about the impact of its interventions. Had inspection by the police and magistrates fanned the heroism of the victim and the fame of her performance?¹⁵⁰ Had the circulars in force added the sanction of government to that of the shastras in the case of the permissible sati?¹⁵¹ In June 1823 the Court of Directors expressed their apprehension that a law which explained cases in which sati should not be committed might be read 'as a direction for adopting it in all others.'¹⁵² They also indicated their reluctance

to make the British Government, by a specific permission of Suttee an ostensible party to the sacrifice; we are averse also to the practice of making British Courts expounders and vindicators of the Hindoo Religion, when it leads to acts which, not less as Legislators than as Christians, we abominate.¹⁵³

Yet, if the unauthorized sati went unpunished, would it not undermine the object of restricting the rite?¹⁵⁴ From 1823 the

¹⁴⁷ In this draft, failure to give notice of a sati was made a misdemeanour punishable under the general powers of the magistrate. If the widow was barred from immolation by one of the prohibitions of the shastras, or if she was below the age of sixteen, the offenders were to be committed to the Court of Circuit to be punished according to the 'nature and criminality' of the offence. Home Misc. 540.

¹⁴⁸ GG in C to COD, 1 February 1820, in *Progressive movements*, p. 118.

¹⁴⁹ *Ibid.*, p. 119.

¹⁵⁰ Cf. Commr Deccan to Secy, Bombay Govt, 15 December 1823, Judl Dept, vol. 19/80, 1824, p. 392, MSA.

¹⁵¹ GG in C to COD, 1 February 1820, *Progressive movements*, pp. 118-19; Cf. also Home Misc. 540, pp. 272-3 for similar anxieties.

¹⁵² COD to GG in C, 1 February 1820, in *Progressive movements*, p. 121.

¹⁵³ *Ibid.*

¹⁵⁴ Cf. observations of the Judge of the Court of Circuit in a case where Guneshea though a Brahmin, had burnt herself without the body of her husband. Here her brother-in-law was sentenced to two years imprisonment for having assisted at an 'illegal' sati. Govt against Ramdutt and Balgobind, 20 June 1823, *NAR*, II, pp. 274-7.

courts began to formulate punitive sentences for assistance in a sati which, though 'voluntary', had infringed one of the other criteria outlined in the circulars.¹⁵⁵ However, the pandits of the Sadar Diwani Adalat proved very reluctant to stand by the 'Hindu law' on sati as distilled from their earlier vywasthas and classify certain satis as criminal. They began to reintroduce the authority of usage and inspiration into the trial, compelling the judges to fall back upon the earlier vywasthas and circular orders as the basis for passing sentence.¹⁵⁶ In one case a Brahmin widow had immolated herself because she dreamt that her husband, who was away, had died; to which the pandits stated that 'through the excess of her chastity' a woman could know that her husband was dead through a dream. In another case the sister of the deceased man had also immolated herself. Here the pandits said she must have done something in a former existence to convince her that this was her only means of salvation, an opinion which W. Dorin, the fourth judge of the Nizamat Adalat, termed a 'good specimen of their absolutely nonsensical ideas on the subject of criminal law'.¹⁵⁷

The debates around sati were in a fundamental sense about the symbolic structure of public authority. Hitherto, government had allowed the rite as a symbol of the toleration it extended to the Hindu religion, whatever the ambiguities it introduced into the legal realm. The decision, not only to abolish sati, but to do so by formal regulation and open proclamation, indicated an effort to place public authority upon a more transcendent footing. Public parley between the juridical claims of the state and those made on the citation of religious belief was to be curbed. The alternative, suggested by many officials, as also significantly by Raja Ram-mohun Roy, could have been to authorize magistrates to take *ad*

¹⁵⁵ *Ibid.* and Govt against Surnam Tewary, 16 July 1823, *NAR*, II, p. 279 for another such case. However, C. Smith, second judge of the Nizamat Adalat, had expressed strong doubts about the legal basis on which punishment was being awarded.

¹⁵⁶ In two instances, Brahmin women had immolated themselves without the body of their husbands. The pandits argued that immolation was the means of acquiring virtue and the means of doing so secondary, therefore the sati was legal. Yet in their earlier vywastha they had stated that Brahmin women were not permitted to burn on a pyre separate from that of their husbands. Cf. Govt. vs Ramdutt and Balgobind, 20 June 1823, and Govt vs Surnam Tewary, 16 July 1823, *NAR*, II, pp. 274-7, 279-81.

¹⁵⁷ *Ibid.* and Govt vs Degumber Pande, *NAR*, II, pp. 246-8.

hoc measures to suppress the rite.¹⁵⁸ Formulated as a law, the prohibition of sati, was, as John Malcolm had warned, clearly 'an act of power'.¹⁵⁹ Bentinck took this position very strongly in his minute on sati.

[N]ow that we are supreme, my opinion is decidedly in favour of an open, avowed and general prohibition, resting entirely upon the moral goodness of the act, and our power to enforce it¹⁶⁰

However, in the preamble to the sati regulation, Bentinck still struggled to maintain that there had been no real shift in the 'traditions' of British rule *vis-à-vis* religious practice. The reasoning here is a marvel of bureaucratic sleight of hand. Sati, so the preamble went, was not an imperative religious duty, but in any case, government had found it impossible to prevent abuses in its performance. It was therefore justified in abolishing it altogether.¹⁶¹ This preamble had been framed according to the advice given by E. Ryan, Puisne Judge of the Supreme Court of Calcutta:

it should appear that the rules and restrictions were passed merely to compel a strict compliance with their usages . . . it then follows that all regulations and restrictions are ineffective . . . and that in consequence the government determines to abolish the custom altogether.¹⁶²

Once the decision had been taken to prohibit sati by law, the Nizamat Adalat threw its weight against exceptions distinguishing it from other cases of homicide.¹⁶³ Bentinck had also asked the

¹⁵⁸ Bentinck's minute on sati, 8 November 1829. *CLWCB*, 1. This would have meant an extension of the strategy already being deployed. John Malcolm, Governor of Bombay, had suggested the use of panchayats of respectable natives to assist in suppressing the rite instead of a legislative enactment. John Malcolm, minute, 5 March 1830, *Judl Dept*, vol. 20/213, 1830, p. 141, MSA.

¹⁵⁹ *Ibid.* The danger lay not in tumult, Malcolm warned, but in 'dangerous impressions' regarding the mode in which British Government proposed to exercise its power. Minute, 16 April 1830, *ibid.*, p. 175.

¹⁶⁰ *CLWCB*, 1, p. 337.

¹⁶¹ Preamble, *CLWCB*, 1, p. 360.

¹⁶² Sir E. Ryan to Bentinck, *CLWCB*, 1, p. 269.

¹⁶³ It advised Government against introducing the less serious charge of 'misdemeanour' along with that of 'culpable homicide'. This ensured that the case would be sent up to the Court of Circuit for trial. Cf. GG in C to COD, 4 December 1829, in *Progressive movements*, p. 155. Persons who aided and abetted a sati, whether voluntary or not, were declared guilty of culpable homicide, and punishable by fine or imprisonment at the discretion of the

Nizamat Adalat whether the attendance of the Islamic law officers, part of the regular procedure of trial, should be prohibited in sati cases, to avoid 'misconstruction'.¹⁶⁴ But the judges saw no reason, they said, to exempt the offence from the ordinary course of trial, 'and for depriving the Courts of Justice of the valuable assistance of their law officers'¹⁶⁵

Public Authority and the Spectacle of Sati

From the eighteenth century Europeans in India had written about and sketched various self-inflicted tortures of the body, of the sort which belonged to the medieval past of Christianity — 'fakir penances', the 'horrid exhibitions' of hook-swinging at the *Charakh-puja*, and the 'human sacrifice' of sati.¹⁶⁶ The idea that cruel spectacles were debasing to the public was one of the themes of the penal reform movement in Europe. Was the woman burning on the pyre an inspired figure in the middle of a religious assembly, as the defenders of sati would have it, or was it a savage spectacle of torture?¹⁶⁷ European accounts could use both these

Court of Circuit. Those convicted of using force or compulsion could be sentenced to death by the Nizamat Adalat.

¹⁶⁴ Secy Judl Dept to W.H. Macnaghten, Regr, NA, 1 December 1829, *Judl Dept*, vol. 20/213, p. 164, para 12, MSA.

¹⁶⁵ NA to Secy Judl Dept, 3 December 1829, *ibid.* Cf. also NA's construction of the sati regulation, 30 October 1840, withdrawing an earlier construction which had exempted a person aiding and abetting a sati from a sentence of labour in addition to imprisonment. J. Carrau, *Circular orders*, Calcutta, 1855, p. 250.

¹⁶⁶ Cf. A. Dow, *The history of Hindustan*, 1803, 1, for a critical reference to 'enthusiastic penances'. C.R. Francis, *Sketches of native life in India*, 1848, p. 5, attributing fakir penances to the 'withering effects' of Hinduism. T. Rowlandson's 1815 sketch, 'The burning system illustrated' shows a widow perishing on the pyre, while a hook-swinging devotee whirls in the background. *The Raj*, National Portrait Gallery Publications, 1990, No. 279. F. Baltazard Solvyns, a French painter, dangled the bait of handsome plates of sati to attract buyers for his set of engravings. These also had plates of the 'expiatory tortures' of the *Charakh-puja*, and of fakirs. *Les Hindous*, vols I and II, 1808–1812.

¹⁶⁷ Superintendent of Police, Walter Ewer, found it necessary to assert that the crowd around the sati displayed 'none of that holy exultation that formerly accompanied the departure of a martyr, but all the savage merriment which, in our days accompanies a boxing match or a full bait.' Cited in L. Mani, 'Production of an official discourse', ws 35. Bentinck, as I pointed out earlier, had referred to the 'brutalising excitement' of the rite. Minute on sati, 8 November 1829.

images in the same description of sati.¹⁶⁸ The 1830s were marked by debates about official participation in Hindu and Muslim ceremonies and about the Company's involvement in Indian religious establishments. Missionary criticism of Government for 'countenancing' sati, was buttressed by the sense of racial offence expressed by many officials in having to put up with spectacles revolting to British and Christian sensibilities.¹⁶⁹ Because sati seemed to challenge the state's monopoly over the taking of life, it could not simply be pushed out to spaces where it did not offend European feelings.

The terms in which Rammohun Roy vindicated the sati enactment give us an insight into the dilemmas of an 'enlightened' Indian public opinion at this time. Rammohun defended the sati regulation by arguing that the promise of religious non-intervention did not apply to observances which were 'a nuisance and outrage to public feeling' and 'a reproach to a civilised government'.¹⁷⁰ Among such observances he included not only infanticide, suicide under the car of Jagganath, and the self-destruction of lepers, but also 'the perambulations of the streets by Nagas (or naked devotees) . . .'.¹⁷¹ Sati was

a source of greater offence and disgust to the public than the rest, from its being performed with more publicity and tumult, and exhibiting the most helpless of human beings expiring under the greatest sufferings.¹⁷²

Here, Roy sounded a personal note of distress over the widow's suffering.¹⁷³ But what of that other public which Roy said would

¹⁶⁸ Solvyn, described the sati as a 'cruel practice' which the widow undertook because promises of future happiness worked on her 'weak and superstitious mind', and because she knew her hard fate as a widow. But he also referred to her 'courageous resolution'. *Les Hindous*, II, pp. 12-13.

¹⁶⁹ Cf. for instance, editor's remarks, *India Gazette*, 27 March 1818, in *Progressive movements*, p. 112. Also epilogue for a further discussion.

¹⁷⁰ 'Remarks in vindication of the resolution passed by the Government of Bengal in 1829 abolishing the practice of female sacrifices in India', 1831, *Progressive movements*, pp. 186-8.

¹⁷¹ *Ibid.*, p. 187. Europeans in the Presidency towns were beginning to demand magisterial action against beggars and ascetics who made 'disgusting spectacles' of themselves. Cf. epilogue for further details.

¹⁷² *Ibid.*, p. 187.

¹⁷³ For Rammohun Roy and other reformers of the time, the Hindu male ought to stand forth as the civilized protector of women, instead of making

not rise against the sati injunction because of the nature of their education and their want of physical energy?¹⁷⁴ There are suggestions here that the 'enlightened' public of Bengal felt marginal in relation to a more conservative public, but shared the consciousness of political subjugation with it, a consciousness voiced in the idiom of masculine failure.¹⁷⁵

Through the sati regulation the government signalled an effort to curtail the legal ambiguities arising from negotiation with a traditionally conceived public. This ambition is most clearly outlined in Macaulay's draft penal code of 1837.¹⁷⁶ However, even this could not entirely obliterate the mark of past compromises. One example is the category of 'voluntary culpable homicide by consent', which was clearly put in to provide for cases of 'voluntary' religious suicide.¹⁷⁷ In the draft code 'voluntary culpable homicide' was punishable by death, transportation or rigorous imprisonment for life. But 'voluntary culpable homicide with consent' drew simple or rigorous imprisonment for a term of two to fourteen years.¹⁷⁸ For a code which claimed to draw upon universal principles of

himself vulnerable to the charge of burning alive 'the most helpless of human beings' alive. Cf. 'An address to W. Bentinck' from Callynath Choudhury, Ram Mohan Roy, Dwarkanath Tagore and others, in Sophia Dobson Collet, *The life and times of Rammohun Roy*, 1988, p. 428.

¹⁷⁴ *Ibid.*, p. 186. Roy meant that the education of Bengalis lacked a warlike component.

¹⁷⁵ It may be asked whether Roy spoke with the ambivalence of that educated but supposedly emasculated public when he advised Bentinck to suppress sati quietly, lest 'people' say that having obtained power the English were violating their professions of religious non-intervention. Or when he referred to the firmness displayed by the woman who offered to burn, 'in a country where the name of death makes the male shudder . . .'. Cf. Bentinck's 'Minute on sati' and K. Nag and D. Burman, *The English works of Ram Mohan Roy*, III, 1947, p. 125. Lata Mani has drawn attention to the ambiguity of the latter statement. 'Contentious traditions'.

¹⁷⁶ Cf. Indian law commissioners to GG in C, 14 October 1837, *PP*, 1837-38, vol. 41, pp. 465-8.

¹⁷⁷ 'Voluntary culpable homicide' is 'voluntary culpable homicide by consent', when the person whose death is caused, being above twelve years of age, suffers death, or takes the risk of death, by his own choice. 'The influence of the rite of sati on this provision is clear from the illustration which followed: '(a) Z., a Hindoo widow, consents to be burned with the corpse of her husband. A. kindles the pile. Here A. has committed voluntary culpable homicide by consent.' Draft Penal Code, clause 298, in *PP*, 1837-38, vol. 41, p. 507.

¹⁷⁸ *Ibid.*

jurisprudence, this was an unusual category of homicide. Macaulay's justification illustrates the way in which colonial law-makers continued to refer to the cultural sensibilities of their subjects in evaluating motive. The motives which prompted men to commit 'voluntary culpable homicide by consent', wrote Macaulay, were 'generally far more respectable than those which prompt men to the commission of murder.'¹⁷⁹ Such offences, he continued, did not produce general insecurity in society, and this distinction had in practice exercised an influence on the courts. 'It may be proper to observe', he concluded, 'that the burning of a Hindu widow by her own consent though it is now . . . an offence by the regulations of every presidency, is in no presidency punished as murder.'¹⁸⁰

Though the penal code was put through various committees and brought into force only in 1862, Macaulay had evidently set a standard for a more imperious model of law giving. Cornwallis' biographer, in the *Rulers of India* series evidently felt called upon to defend the phraseology of the earlier 'code' of 1793 from unfavourable comparison with the 'precise, correct and luminous language of the Acts from 1833.'¹⁸¹ Law-making of that earlier period, he explained, had to overcome the mutual unfamiliarity between the new rulers and their subjects:

The preambles and occasionally some of the sections, contained reasons and explanations for the new procedure. Some are more in the nature of a manifesto from the ruling power than a law. The Governor General reviewed the past, pointed out the errors discovered in practice and arising out of imperfect knowledge of the wants of the people and, then proceeded to apply a legislative remedy.¹⁸²

It is this negotiatory aspect to law-making which emerges clearly in the earlier 'voluminous', 'imprecise' and 'variable' regulations. Subsequent consolidations and re-classifications began to erase this track of contest and accommodation.

¹⁷⁹ Ibid., Note M, p. 564.

¹⁸⁰ Ibid.

¹⁸¹ W.S. Seton-Karr, *The Marquis of Cornwallis*, 1893, p. 96.

¹⁸² Ibid.

Chapter Four

The Magistrate and the Domestic Sphere

Even as regulations to punish offences against the person extended colonial magistracy into the household, a counter-vailing set of regulations defined a boundary against intervention. These excluded certain issues from criminal process or gave them a secondary status within it. I hope to give a sense here of the range of pressures under which the Company formulated a distinction between matters of 'personal' right, to be dealt with in the civil courts through the religious law of the parties concerned, and matters of 'public interest', placed in the realm of magisterial authority.¹ Disputes about defining the domain of domestic authority constantly put pressure on this distinction.

In her analysis of gender relations in colonial India, Rosalind O'Hanlon stresses

the broad degree of consensus between Indian politicians and the colonial state, established early in the nineteenth century, and reinforced in the years after the wars of 1857, that for all routine civil purposes domestic and family questions were outside the purview of the state, except in so far as it was necessary to 'administer' the appropriate community and religious law.²

In similar vein Tanika Sarkar argues that colonial law reinforced the resistance of revivalist nationalists to state intervention in the domestic sphere, because of the distinction between law which had a territorial scope and dealt with the public world and personal law, which was equated with religious law and held sway over family relationships, family property and religious life. The legal

¹ In the civil courts, which dealt with 'suits regarding succession, inheritance, marriage and caste and all religious usages and institutions', the Hindu law with respect to Hindus and the Islamic law with respect to Muslims was applied. Reg 4, s 15, 1793.

² Rosalind O'Hanlon, *A comparison between women and men*, 1994, p. 51.

measures which the state actually took to improve the position of Indian women, she says, were only a belated surrender to Indian reformist pressure.³

This view has been a useful corrective to analyses which focus too narrowly on the salvationist rhetoric of the colonial state, on its claims to have rescued the Indian woman from the horrors of Indian tradition.⁴ However, some of the complexities of the state's own investment in re-shaping the domestic sphere deserve a fuller investigation. A sense of the different social levels at which the colonial functionary, as judge-magistrate, tax collector, military recruiter or census recorder, made pronouncements about the right sort of domestic life might also qualify the significance of 1857 as the point of retreat from reformist interventions.⁵

I begin by arguing that colonial governance sought to domesticate patriarchal authority, to reconstitute the boundaries between household, state and market, as the condition for endorsing its sway. Certain manifestations of patriarchal prerogative were rejected as excessive because these were bound up with an older political order which clashed with the ideological, fiscal and pacificatory imperatives of the colonial state.⁶ The preceding chapters elaborated the argument that the Company's legal claims over the person of its subjects set out a crucial terrain for the redefinition of sovereign right. The level of chastisement which a man could inflict on a female relative, or a master on his servant or slave for

³ Tanika Sarkar, 'Rhetoric against age of consent', *EPW*, 28, 36 (4 September 1993), pp. 1869-78, 1870-1.

⁴ See Dipesh Chakrabarty, 'The difference-deferral of a colonial modernity', in D. Arnold (ed.), *Subaltern studies*, VII, 1994, pp. 50-88. Here James Mill's critique of Indian civilization in *History of British India* seems to constitute the definitive colonial stance on the women's question. Cf. also Lata Mani, 'Contentious traditions', p. 118.

⁵ The selective registration of infant births and deaths to police female infanticide was, for instance, extended after this upheaval and given legal shape in Act VIII of 1870. But certainly, post-mortems of the 1857 rebellion allowed various interest groups, both of the colonial public and of 'respectable Indian society', to expound their point of view on state intervention in domestic life. Opponents of Vidyasagar claimed that it was the Widow Remarriage Act which had alienated the *sipahis* from the British Government. Sricharan Chakravarti, 'Life of Pandit Isvarachandra Vidyasagar', in *Marriage of Hindu widows*, 1976, pp. 53-4. Cf. also Saiyid Ahmed Khan, *History of the Bijoor rebellion*, 1982, Appendix A, p. 168.

⁶ I have taken up the instance of female infanticide to illustrate this point.

the exaction of services or for the violation of behavioural norms, could no longer be permitted to take the form of death or serious physical injury.⁷ At the same time, the judicial credibility given to male narratives of 'shame and disgrace', 'sudden anger' and 'great provocation' as a mitigatory factor, readmitted patriarchal prerogative under the aegis of rule of law. The debates on slavery in India also exposed the tacit understanding of many magistrates and judges that the head of the household had a certain right of restraint and moderate chastisement *vis-à-vis* women, children, servants and slaves.

Turning to the regulations discouraging police and magisterial intervention, one of the operative factors here was an effort to narrow the public dimensions of certain norms of moral regulation by relegating them to the sphere of the domestic and the personal. A certain cultural uncertainty pervaded the retreat of the new rulers from moral domains on which indigenous potentates had confidently pronounced.⁸ But, in the process, colonial regulations came to redefine the scale by which the heinousness of certain sexual offences was judged, as for instance by sharpening the distinction between adultery as a 'private wrong', and rape as a 'public offence', and bypassing any commitment to punish for fornication.⁹

Intervention was also limited by the state's concern to conserve police and judicial agencies for its own priorities of rule. When the Company's government did not want certain kinds of complaints clogging the criminal courts, it justified its procedural or fiscal restrictions on prosecution by arguing that such charges were usually 'unfounded, misrepresented, or greatly exaggerated. . . .'¹⁰ Anxieties about being able to control a police agency, low-paid but wielding enormous discretion, also prompted colonial law makers to seal off certain 'domestic matters' from their

⁷ For slaves cf. Reg 8, s 2, 1799 and CONA No. 4 of 27 April 1796; also F. Skipwith, *The magistrate's guide*, 1843, p. 197.

⁸ For Mughal examples, see Akbar's farman detailing the duties of the kotwal and Aurangzeb's 'farman with preface of justice', 1672, in *Mirat*, 1965, pp. 145, 248.

⁹ Here the distinction I am making between adultery and fornication is between marital infidelity and sexual relations between unmarried persons. Incest and sodomy were cognizable offences.

¹⁰ Reg 3 of 1812 imposing restrictions on prosecutions for adultery, rape, fornication, calumny, abusive language, trespasses and assaults.

jurisdiction.¹¹ This demarcation was presented as evidence of the Company's concern to protect family life from extortionate intrusions. But it also allowed the state to demonstrate an indulgence for civilizational particularity,¹² and to make a public acknowledgement of distinctions of social rank held to depend upon the seclusion of female relatives.¹³ In addition, the proposition that the punishment of certain offences was best left to the community or to the head of the household harmonized with the aspiration to maintain order not only through law and policing but also through the organic institutions of social authority.¹⁴ The domestic life of Indians, whatever the criticism it drew from missionaries,¹⁵ was warmly commended by officials and European observers in certain contexts. The familial attachments of the high-caste *Purbia* soldier, his eagerness to retain his service so he

¹¹ For an example of such concerns about the police force cf. CONA, No. 195, 4 February 1818, in H.C. Tucker, *My notebook*, 1848, p. 97. Also Judl Progs, vol. 356A, pp. 6936–69, Tamil Nadu Stat. Archives, Madras (TNA).

¹² In outlining a scheme for British rule in India, Alexander Dow recommended that the 'regulations, with regard to their women and religion must never be touched'. *The History of Indostan*, new edition, 1803, vol. 1, p. clxxi. W. Hamilton reassured his readers that under Company rule 'the respect which Asiatic manners enjoins to women of rank, is scrupulously enforced.' *Geographical, statistical and historical description of Hindostan*, 1820, 1971, p. 82.

¹³ Special procedures regulated the way in which women of rank gave evidence in a court of law, and they could be exempted from personal appearance in a civil court. Reg 50, s 2, 1803; Reg 4, s 13, 1793. *The Asiatic Journal and Monthly Register*, vol. xxv, March 1828, p. 370. Officers conducting searches for violations of the *abkari* regulations were prohibited from entering the *zenana* 'in houses belonging to persons of respectability and credit; that is, of all those classes whose women do not ordinarily appear in public'. Reg 10, s 24, cl 4, 1813 (emphasis added). On the other hand, one of the most common, though prohibited, police devices for securing a man's arrest or his confession if he belonged to the 'lower orders', was the coercion with threats of sexual molestation of his female relatives. Cf. T. Perry papers, Addl Mss 5379, Cambridge University Library. Also CO, No. 9, 20 July 1842, from SP, LP; Bengal Judl Progs, 22 August 1842, No. 39, WBSA.

¹⁴ In the reverse direction, images of paternalistic authority were carried over into the sphere of governance to emphasize the virtues of magisterial discretion. For examples, G. Campbell, *Modern India*, London, 1852, p. 481. See Michael Anderson, 'Work construed', in P. Robb (ed.), *Dalit movements*, 1993, pp. 87–120, for the ideological contradictions within colonial labour policy, committed both to securing the stability of 'natural' authority relationships, while introducing bourgeois legal concepts derived from *laissez-faire* models.

¹⁵ Cf. Rev. C.B. Leupolt, *Recollections of an Indian missionary*, 1856, pp. 40–4.

could send money home, seemed to vest him with a 'sobriety and prudence' which precluded the kind of disciplinary problems posed by British recruits.¹⁶ Government's reluctance to assume responsibility for poor relief or insane asylums was justified by the contention that Indian families looked after their poor and their lunatic.¹⁷

Yet the issue of curbing vagrancy, of fixing responsibility for the maintenance of women and children with a specific man, sometimes drew magisterial authority into projects to make the head of the family act more appropriately as one.¹⁸ Even more persistent was the pressure put on colonial magistrates by men of the 'lower orders' to enforce their claims over the labour, sexual services and reproductive potential of their female relatives, as against other men, or in competition with the market for prostitution, public entertainment and domestic service. If the higher ranks were reluctant to give information about the female members of their household,¹⁹ the poorer sections seemed only too ready to make their domestic matters public in ways which British officials considered unseemly by their own notions of masculine honour. 'Husbands come to complain', wrote Richard Jenkins, resident at Nagpur, 'without the least appearance of concern that their wives have gone to live with other men, and apply to have them restored. . . . Chastity, he concluded, was of little concern to the lower classes, the husbands just wanted their wives to be restored.'²⁰ Mughal hakims and their indigenous successors also

¹⁶ W.H. Sleeman, *Rambles and recollections*, 1844, 1890, reprint, 1980, pp. 617, 625.

¹⁷ *Modern India*, pp. 66–7. One of the most persistent and influential arguments for not intervening in Indian slavery was that its domestic and patronal nature qualified it to fulfill certain 'poor relief' functions in times of scarcity. See below.

¹⁸ See below for Reg 7, s 3, 1819. Some British magistrates advocated widow remarriage, less from a concern for the high caste widow, than as a means of bringing formality to the co-habitation arrangements of the lower classes, and fixing legal responsibility for support. Cf. F.J. Shore, *Notes on Indian affairs*, II, 1837, pp. 399, 401.

¹⁹ For example, *Report on Nagpore*, 1827, p. 14 and J. Prinsep, 'Census of the city of Benares', *Asiatic Researches*, xvii, pp. 470–98.

²⁰ *Report on Nagpore*, pp. 42, 59; also, Commr Kumaon, to Secy NWP, 11 July 1843, No. 52, COK, PMJ, vol. 13, Book 8, 1 August 1842–10 February 1845, UPSA. In one account of the cession of Kumaon to British rule the Company had been asked to ensure that hill women were not seduced by

accepted responsibility for preventing women from entering the public market in prostitution and entertainment against the wishes of their male relatives. A farman appointing a kotwal instructed him to 'have the hands shortened' of 'insidious old women, pimps, or jugglers, who lead the wives and daughters of honest men into the ways of evil.'²¹ One issue therefore was the degree to which the magistrate should police the boundary between the domestic sphere and the public traffic in women and children.

For households at the upper end of the social spectrum, the master's authority over servant and slave was bound up with the maintenance of rank, distance from demeaning labour, and the seclusion of the women of the household.²² The European household shared these status concerns involved in the disciplining of servants, though in a somewhat different way. Company officials opposed measures to abolish Indian slavery on the argument that this institution, unlike its American or West Indian counterpart, was primarily a domestic phenomenon. This implied a mild state of servitude, characterized by affective relations and life-long attachments. But the description had a special resonance when applied to the position of the slave woman in the household. Here the relationship of subordination was said to be a particularly delicate issue because of its overlap with the institutions of concubinage and polygamy. The one factor which disturbed this characterization of Indian slavery was the traffic in human beings, which seemed to bring the public world of commodity in embarrassing proximity to this domestic sphere. This traffic was something which ruptured ties of family and locality, a prominent

people from the plains. 'Aadmi pabad ka garibsuda hai, auratein is mulk ke kisi ke babkavati se badnam na hon', Badrinath Pandey, *Kumaon ka itihas* (Hindi), 1932, reprint, 1990, p. 437. Representations were also made to magistrates to recover wives or daughters who had left the household to take to prostitution. Magt, suburbs of Calcutta to Regr NA, 10 July 1815, BCrJ 9 July 1819, No. 312, pp. 171-5, WBSA. W. Bird, Judge-Magt, Banaras, said prostitutes should be confined to certain quarters to protect families from intrigue. 20 August 1814, Home Misc, 775, vol. 1, p. 489.

²¹ A. Dow, *The history of Hindostan*, vol. III, 1770, pp. 376-7. Also Aurangzeb's 'farman of justice' in *Mirat*, p. 248. The kotwal of Pune under the Peshwa regime was instructed to prevent married women from becoming prostitutes, V.D. Rao, 'A note on the police of the city of Poona', *Journal of Indian History*, xxxvi (1958), pp. 223-8.

²² I have restricted myself to domestic slavery, and not discussed agrestic servitude.

feature of the humanitarian critique of slavery in the Western world.²³ Its existence indicated a dangerous fluidity at the boundaries of the household, suggestive of pressure on the productive cycle or an unsettled state of society. The traffic in slaves also seemed to encourage illegal sources of supply, in particular the kidnapping of children by wandering communities such as the Banjaras and the Gosains, whose commerce the colonial state found difficult to police.²⁴ Discussions about the policies to be adopted on the selling, buying and re-selling of women into marriage or concubinage wove in and out of this debate. How were these transactions to be insulated, both practically and ontologically, from the traffic in slaves?²⁵ Even those officials who advised against drastic interventions in Indian slavery sometimes recommended measures to curb and regulate the selling and buying of human beings.²⁶

The current consensus is that the pressure to withdraw all

²³ Reg 10 of 1811 prohibiting the import of slaves from foreign countries indicates the Company's concern to vindicate its moral credentials in this matter. The preamble stated that this traffic 'was inconsistent with the dictates of humanity and with the principles by which the administration of this country is conducted.' The channelizing of females, not only into the obscurity of households, but into an 'immoral commerce' made this traffic even more of an embarrassment.

²⁴ For such suspicions see Malcolm, *Memoir*, II, p. 201; Mrs Guthrie, *Life in Western India*, vol. II, 1881, p. 14; and W.H. Sleeman to J.P. Grant, Secy to Govt, Leg Dept, 18 February 1840, Leg Progs, 2 December 1843, No. 92, p. 1046, NAI.

²⁵ The disposal of the wife or widow within a certain community circle was usually a socially accepted and stable form of concubinage, with the transfer sometimes initiated by the woman herself. Nevertheless, as Gayle Rubin points out, since it is men who 'give' women, it is they who are the beneficiaries of the exchange, whatever the values they acquire through her disposal. Gayle Rubin, 'The traffic in women, notes on the "political economy of sex"', in K.V. Hansen and I.J. Philipson (eds), *Women, class, and the feminist imagination*, 1990, pp. 74-112. Bride price could, under the pressure of scarcity, or high revenue demand, be transposed to a wider traffic, where the woman might still be transacted as wife but also as concubine, prostitute or domestic servant, and she would have less say over her disposal than in the former instance.

²⁶ Cf. V. Hall, Collr Sholapur, to Commr Deccan, 27 July 1825; E.N Baillie to Secy, Bombay Govt, 21 November 1825, PP, 1837-38, vol. 51, pp. 436, 448; A. Amos, 'Second minute on draft Act to mitigate the state of slavery', 10 January 1842, Indian Legislative Consultations (Leg Cons), 24 January 1842, Nos 1-8, NAI.

legal recognition for slavery was largely generated by the anti-abolitionist movement in England.²⁷ The Charter Act had vested the Company with greater prestige by virtue of a closer association with Parliamentary authority, but it also forced the administration to assuage 'the moral feelings of Englishmen' in the matter of slavery. The colonial government certainly found itself under pressure now to reformulate the cultural and symbolic components of its institutions of rule, to an extent which many of its officials considered inappropriate to the political agenda in India. I shall be arguing that an influential current of opinion within the Indian administration remained unconvinced about the advantages of embracing what has been termed the juridical discourse of freedom and voluntary contract.²⁸ Officials warned that the British magistrate might be precipitated into the dangerous terrain of domestic regulation, where the head of the household had once maintained a proper hierarchy of subordination. Yet administrative concerns related to the stability of the household as a unit of production provided Indian co-ordinates for the discourse of crime and immorality generated around the traffic in slaves. The question therefore was of *how far* relationships of personal subordination were to be transposed to the sphere of 'voluntary contract'. I am speculating that the characterization of slavery in India as largely domestic was informed by a notion of civilizational particularity which continued to affect the legal status of married women and daughters long after men had been 'liberated' into the realm of voluntary contract.²⁹ Once the domestic sphere had been narrowed down to kinship ties alone and conceptually distanced from the public traffic in human beings, then male guardianship over the woman could be endorsed with the proper paternalistic overtones. W.H. Sleeman, for instance, wanted the sale of children by their parents to be prohibited,

²⁷ N.G. Cassells attributes it to the Evangelical drive to abolish slavery, 'Social legislation under the Company Raj', *South Asia*, new series, xi, 1 (June 1988), pp. 59–86. Michael Anderson says parliamentary pressure to legislate on slavery was 'part of a larger process in which notions of free labour were exported around the globe by colonial powers seeking to administer larger work forces in accordance with free market models.' 'Work construed', p. 99.

²⁸ By Gyan Prakash, *Bonded histories*, 1989.

²⁹ I derive my line of thought here from Carole Pateman's creative interrogation of the theory of social contract for the 'sexual contract on which it is pre-supposed. *The sexual contract*, 1988, reprint, 1991.

arguing that the existence of this traffic encouraged kidnapping, murder, and the sale of girls to prostitutes. At the same time, he argued very strongly for the retention of the criminal provisions against enticement and adultery to support the authority of father and husband.³⁰

The degree to which laws punishing offences against the person impinged on relations of personal subordination, changed with the administrative and political circumstances of rule. It is ironical that the regulations which made the master criminally responsible for inflicting death or serious injury on a slave could be frequently invoked as an argument against abolishing slavery in India. The reasoning was that Indian slavery, a 'mild domestic servitude', was becoming even milder under Company rule because the master was aware that any act of cruelty would be punished by the British magistrate.³¹ The priority for the state was to establish its right to punish injury to person, not to ensure the subject's freedom from personal restraint. Thus, in 1808, when the muftis of the Company's superior court gave expositions of the Islamic law which could have been used to emancipate whole groups of slaves, these were not utilized.³² Instead, British magistrates assumed an authority not permitted in Islamic law, that of emancipating the slave in individual cases of cruelty.³³ This option had the advantage of

³⁰ Cf. W.H. Sleeman, Commr for Suppression of Thuggee and Dacoity to J.P. Grant, 18 February 1840 and 18 July 1840, Leg Progs, 2 December 1842, part III, No. 92, pp. 1043–5, 1046, NAI.

³¹ Cf. E. Colebrooke, minute on slavery, 1812 and Mosely Smith, Offg Commr Kumaon to Secy, Agra Govt, 5 February 1836 in *PP*, vol. 51, 1837–38, pp. 313–14, 361. Also observations of G.C. Cheap, SJ, Mymensingh, 19 September 1836, *PP*, 1841, vol. 28, paper 262, Appendix II, No. 47.

³² The muftis gave a very narrow definition of the proper slave. They also said the sale of children during a famine did not make them into slaves, and that the sale of females as dancing girls was illegal. *PP*, 1837–38, vol. 28, pp. 315–26. Gyan Prakash seems to assume that the muftis constructed exactly that version of the religious law on slavery which the colonial state required, that they 'sent in replies that re-affirmed the centrality of the freedom-bondage opposition in the colonial discourse'. But having obtained this interpretation, he does not explain why the Company did not use it to emancipate whole groups of slaves. *Bonded histories*, pp. 11, 147–8. I would argue instead that one has to concede a certain coherence to traditions of Islamic jurisprudence, and allow for gaps between the religious tradition being constructed by the state and that being re-formulated at various levels of Indian society.

³³ Cf. *NAR*, vol. 1, pp. 55–6.

maintaining magisterial authority in the matter of injury to person while preserving slavery as a civil status.

Civil Pacification, Revenue Settlement and the Rajput Household

In the North Western Provinces it was not till the 1830s that the Company began to try and prosecute female infanticide by putting suspect Rajput clans under systematic surveillance.³⁴ The earlier phase of this encounter with Rajput infanticide was structured by the priority given to pacification, to making these communities pay their revenues regularly and peaceably.³⁵ Regulation 21 of 1795 brought the act more clearly into the realm of criminal prosecution by stating that infanticide would be tried as murder.³⁶ However, magistrates were warned against unauthorized measures to police the crime which might be regarded as an intrusion into the household.³⁷ Nor was there a systematic scrutiny of the way in which female infanticide was structured by contests around the rank of the Rajput household.³⁸

³⁴ Female infanticide was not restricted to the Rajputs of the North-western Provinces, but I have used this case to illustrate the way in which ideologies about domestic life restructured the relationship between the state and dominant landed communities.

³⁵ Cf. Chapter three. Duncan made the Rajkumar Rajputs give an engagement to renounce infanticide in which they committed themselves to out-casting those found guilty of the act; but the Company did not formulate specific penalties for the offence. Extract from progs of RB, 23 December 1789, *Papers relating to East India affairs*, vol. 1, 1821–30, pp. 7–8. Reports from 1817 indicate that the pacification of the Rajkumar Rajputs was still underway. Cf. BCrJ (WP) P/133/7, 14 February 1817, BCrJ (WP) P/133/17, 25 November 1817.

³⁶ By Islamic law the parents of the infant would not be liable to *kisas* (retaliation), because the relationship would bar the death penalty, but Reg 8, s 2, 1799, removed this exception.

³⁷ They were instructed to treat a case of female infanticide as any other case of murder, without assuming special powers of prosecution. The argument was that change could come about only through the agency of society. Report of J. Shakespeare, SP, WP, 30 April 1816, *Papers relating to the East India affairs*, vol. 1, pp. 13–14. Secy Bengal Govt to Magt Jaunpur, 25 November 1817, No. 18, BCrJ P/133/17, WP, 25 November 1817. Given the community and familial backing for this form of infanticide, cases rarely came to court.

³⁸ At this point there was only a general understanding that the expense of securing suitable alliances for daughters underlay the practice. Duncan said

It was the revenue surveys of the 1830s and 1840s which began to expose the fact that female infanticide was more prevalent than had been supposed.³⁹ Thomason, conducting the first extensive survey of pargana Azamgarh in the mid-1830s, came across female infanticide among the Bais Rajputs of pargana Kuba as the result of a chance remark. He had referred to one zamindar as the son-in-law of another. This raised a sarcastic aside: 'where will you find a daughter in Kuba?'⁴⁰ In this post-pacification phase magisterial authority locked in a struggle with the male head of the household over the terms on which Rajput rank and patriarchal right could coexist with colonial rule.⁴¹ The organizing idea of rank was that the daughter was given in marriage to a superior lineage. The more restricted the range within which a Rajput community was ready to give a daughter, the greater the expense of securing a suitable match and the greater the pressure to preclude the loss of

female infanticide among the Rajkumars of Jaunpur was founded on an 'inherent extravagant desire for Independency' and on the disgrace of not having the means to marry their daughters with suitable provision. RB to GG in C, 2 October 1789, BRC P/51/49, 21 October 1789, pp. 181–2. Shore reversed the logic of the practice in stating that because the Rajkumars killed their own daughters, they were 'compelled of necessity' to intermarry with other Rajputs. 'On some extraordinary facts, customs, and practices of the Hindus', *Asiatic Researches*, vol. iv, 1799, 331–50.

³⁹ For the impact of settlement operations on the policing of female infanticide see J. Thomason, Magt Azamgarh to Commr Banaras, 12 February 1836, Banaras, PMJ, Commr's Office Banaras (COB), Basta 132, vol. 4, RAA. M.R. Gubbins, Magt Agra, Memorandum, 23 January 1854, *Selections from the records of the Government of the North Western Provinces (SRGNWP)*, vol. III, article xvi.

⁴⁰ J. Thomason, Magt Azamgarh, to F. Currie, Commr, 12 February 1836, No. 47, Banaras, PMJ, COB, Basta 132, vol. 4, RAA, henceforth, Female infanticide, COB. Unwin, the collector of Mainpuri confirmed his suspicions of female infanticide among the Chauhans of Mainpuri in the course of estimating remissions of land revenue in 1843. C. Raikes, *Notes on the North Western Provinces of India*, 1852, p. 18.

⁴¹ Though officials wrote with horror of mothers who put their daughters to death from a sense of family pride, yet they conceptualized the problem as one of imposing responsibility upon the male head of the household. Cf. W.R. Moore, *Report on female infanticide*, 1859. The mother's name was not asked for in the three forms to be filled in by suspected households under the infanticide Act VIII of 1870. The name of the 'head of the house' and the name of the 'husband, guardian or protector of the pregnant woman' were required. Cf. Forms A, B, C in Public A, 11 February 1870, Nos 107–15, NAI.

capital and status by systematic female infanticide.⁴² If Rajput communities were to be moulded into the sturdy productive yeomanry of the *mahatwari* ideal, they would have to renounce household strategies for status which seemed to be either murderous or fiscally ruinous. The *chaukidar* and the midwife began to be bound down to report births and deaths within the suspected communities to the *thanedar* (head constable).⁴³ Gubbins, the magistrate of Agra could now describe the penetration of the Rajput household in a term as charged with sexual victory as it was syntactically incorrect: 'and thus, by her [the midwife's] instrumentality . . . is exercised without giving offence, that very interference and control in the "penetralia" of the Rajpoot's family, which is commonly supposed to be impossible . . .'⁴⁴

What officials also sought to pin down now was the matrix of marriage alliance which structured Rajput rank.⁴⁵ Certain Rajput lineages had a well-established place in the local status hierarchy. For others, their ranking was something they had to collectively

⁴² Sleeman noted that female infanticide was most prevalent in those clans that restricted the giving of daughters in marriage to the smallest number of clans. *A journey through the kingdom of Oude in 1849-50*, II, 1858, p. 38 (JTKO).

⁴³ Cf. Magt Allahabad to Commr Allahabad, 28 January 1841, Secy NWP to Commr Banaras, 18 September 1839, and Tucker, Magt Jaunpur to Commr Banaras, 20 January 1840, Female infanticide, COB. The policing of infanticide extended that alignment between the British collector's staff and village servants, which the settlement operations of the 1830s had inaugurated. Another 'independent' source which the state now began to call upon to provide evidence was the European Civil surgeon, who could be asked to conduct an inquest. Judl letter GOI to COD, 27 December 1841, No. 15, in *Papers relating to female infanticide in India, 1834-42*, House of Commons, 1843, p. 29.

⁴⁴ M.R. Gubbins, Memorandum, 23 January 1854, 'Female infanticide among the Rajpoot tribes in zillah Agra', *SRGNWP*, vol. III, article xvi. However, some officials argued that government should continue to negotiate with the suspect communities on a platform of reducing marriage expenses. Cf. Thornton, Secy to Govt NWP to Commr Agra, 21 August 1852. Female infanticide, COB.

⁴⁵ G. Campbell, the Magistrate of Azamgarh, not only wanted the special appointment of an officer to collect data on infanticide but also to unravel 'the complicated entanglements of the various Rajput tribes and relative ranks . . .' G. Campbell to H.C. Tucker, 7 October 1854, Female infanticide, COB. Female infanticide in the North Western Provinces was evaluated as pre-eminently a Rajput practice which lower castes might follow only in emulation of their superiors. It was a characteristic assumption that anxieties about rank order were of genuine concern only to the higher orders of society.

struggle to defend against economic and political forces which were eroding it, as in the case of the Bais Rajputs of tappah Kubah.⁴⁶ Within a Rajput clan, one group of families could begin to practice infanticide because political prominence had brought them higher stature.⁴⁷ What has to be noted is that parallel to the status-important movement of daughters into other Rajput *jatis*, were the unions which Rajput men freely formed with women of lower caste to swell the ranks of their followers in a locality.⁴⁸ What British officials termed the 'illegitimate' branches of the family, or a group of 'spurious Rajputs', could in time, through political and material success, ritual and marital negotiation, consolidate their claim to belong to a particular lineage.⁴⁹

⁴⁶ Thomason's report on Azamgarh describes them as 'formerly wealthy and powerful', but under immense strain because of the great subdivision of their landholdings. They prided themselves on giving a daughter only to a clan of superior or equal rank but the expense of doing so made the birth of a daughter a calamity. J. Thomason, Magt Azamgarh to Commr Banaras, 12 February 1836, Female infanticide, COB.

⁴⁷ Among the Monas Rajputs of pargana Bhadohi, female infanticide was prevalent only among families who claimed kinship with the chieftain, the other Monas being termed 'spurious' Rajputs. W. Moore, *Report*, paras 28-32. I am also speculating that a position on the territorial border between two powers could give some Rajput communities the strategic opportunity to carve out a clan based *taluqa*. Status aspirations, and correspondingly female infanticide, probably accompanied this ambition. Duncan had noted the stance of 'extravagant Independency' assumed by the Rajkumar Rajputs whose estate straddled the border between the Banaras Raj and Awadh, and who were known to practice female infanticide.

⁴⁸ This concubinage was in fact a stable union, with the children getting a share of the father's property, though a lesser one than the children of the more status-important union with the Rajput woman. R.M. Martin, *The history of eastern India, Gorakhpur*, 1838, pp. 412, 475. Buchanan reported that the Bandhulgotiya and Bisen Rajputs harboured 'notorious robbers', chiefly 'illegitimate' branches of the Raja's family, *ibid.*, p. 384. C.A. Bayly refers to the loose nature of the social category 'Rajput' in the pre-colonial period, which included groups of soldiers who married women of lower castes to attract followers. *Indian society and the making of the British Empire*, 1988, pp. 23, 29.

⁴⁹ Getting an established Rajput lineage to give a daughter in marriage was one of the most important acknowledgements of the success of this endeavour. Of the uncertain Rajput status of the Gurha Mundela Rajas, Sleeman wrote, 'The princes of this house are all considered to have Rajput blood in them; and some of the most needy of their subjects of that proud caste, condescended to allow their daughters to marry the reigning princes, though very rarely a member of one of the collateral branches of that family.' W.H. Sleeman, 'History of the Gurha Mundala Rajas', *Journal of the Asiatic*

Colonial efforts to re-shape household strategies for rank and honour had many-faceted implications, both for the definition of community and for the context in which elites competed for prestige. Pacification may have made the status-significant Rajput union more important than the one oriented towards expanding followers and connections from the lower ranks of society.⁵⁰ Rajput chiefs, now less dependant on the support of their clansmen, might favour the suppression of infanticide, to widen the status distance between their household and others of their lineage.⁵¹ Rajput assemblies, convened by British magistrates to discuss reductions in the expense of marrying a daughter, also used the occasion to censure those who jeopardized lineage status by stooping to take a bride-price instead.⁵² In addition, the colonial policing of infanticide may have inflected the terms of competition between the Rajput model of status, that of a relatively open warrior group, and the somewhat different strategies for family prestige upheld by other elites. Two of Sleeman's informants 'of rank', Raja Bukhtawar Singh, a Brahmin, and Seeta Ram an 'agricultural capitalist' were ready to speak disparagingly of female infanticide among Rajputs but would not accept that sati was as much a sin.⁵³ In fact

Society of Bengal, vi, II (July–December 1837), pp. 621–48. Cf. F.J. Shore, *Notes*, II, 1837, p. 484, referring to 'Thakurs of the Doab who had children by women of various castes. These often shared in the property and after two or three generations contrived to marry those without 'stain'.

⁵⁰ Cf. C.A. Bayly, *Indian society and the making of the British Empire*, pp. 23, 29. Colonial reports use terms such as 'spurious' descent, or 'mixed blood' to refer to status distinctions between Rajputs. Perhaps government had a certain investment in arresting this outward extension of Rajput status, especially if it cemented alliances which encouraged local resistance to colonial order, or enlarged the pension roll of dependants on some estate.

⁵¹ W.R. Moore referred to one Gajraj Singh, a Bais taluqdar of Singramau, as a man of wealth and influence who exerted himself to put down female infanticide in his estate. *Report on female infanticide*, p. 32, para 69.

⁵² The implication was that they had accepted bride-price for marrying their daughter into a lower-ranking lineage.

⁵³ 'These proud Rajpoots' said Seeta Ram, did not like to put it into any man's power to call them *salabs* or *soosurs*.' Bukhtawar Singh, a Brahmin, seemed critical of the looseness of cohabitation arrangements among Rajputs. He said that scarcely any of the Rajput chiefs were the legitimate sons of their fathers, they were all born of women of inferior grade, or had been adopted. He spoke disparagingly of even the 'reptile Paudies' being able to marry their daughters to Powar Rajputs when, by robbery and murder, they had gained wealth and property. *JTKO*, II, 1858, pp. 312, 20.

they seemed to defend the sati as an alternative model of family renown, competing with the Rajput strategy of infanticide.⁵⁴ The policing of infanticide also allowed Indian revenue officials, now deriving their influence from government employ, to extend their authority over Rajput coparcenary communities.⁵⁵

How was the collection of statistical evidence of infanticide to be linked to the judicial process? Some officials argued that infanticide should be defined as a special crime in which a suspicious death in a suspect community should be enough to make the head of the household criminally responsible.⁵⁶ The thuggee and dacoity laws which made membership of a criminal community the criteria for punishment were cited as a precedent. However, dominant landed communities through whom revenue was realized might be termed 'criminal' and 'murderous' metaphorically, but would not be dealt with as harshly as the peripatetic communities being stigmatized in law as criminal tribes. The Infanticide Act VIII of 1870 did not formulate such special criteria for conviction, but it integrated the monitoring of suspect communities to an aspect of collective liability. The 'proclaimed' village could be made to supply regular information of pregnancies, births, deaths, and the arrival

⁵⁴ Seetaram claimed that the sati tombs near Biswa and other towns were chiefly 'over the widows of Brahmins, bankers, merchants, Hindu public officers, tradesmen and shopkeepers'. He had rarely heard of a Rajput widow burning herself. Bukhtawar Singh contended that the Rajputs and their wives were pleased at the prohibition of sati, 'because others could no longer do what they dared not do'. *JTKO*, II, 1858, pp. 29, 318–20. Much to the consternation of the orthodox party in Calcutta, Babu Kunwar Singh, the Rajput chief of Shahabad, had been one of those who presented an address of thanks at Buxar to Bentinck for abolishing sati. *Progressive movements*, pp. 179–81. Yet there are instances from Bihar and the North Western Provinces of Rajput women immolating themselves. Cf. Yang, 'Whose sati?'

⁵⁵ W.R. Moore's investigation of infanticide in the Banaras division was crucially dependant upon the tehsildars' returns as the preliminary basis for investigation. *Report on female infanticide*, p. 24, paras 6–7. Cf. C.R. Tulloh, *Magt Jaunpur to Commr Banaras* 31 January 1839, No. 28, describing the Rajputs of Chandwich as very antagonistic to the idea of reporting all births to Meer Muhsood Ali, tehsildar of Deogaon. The latter had received a *khilat* for the 'disinterested public spirit' he had shown in suppressing infanticide.

⁵⁶ Cf. W.R. Moore, *Report*, paras 262–73. '(T)he victims demand exceptional protection, for they have no natural avengers... the child is murdered by its own natural guardians.' Le Bas, *Magt Jaunpur to Commr Banaras*, 26 February 1855, *Female infanticide*, COB. Also F.C. Tucker, *Commr Banaras to Secy, NWP Govt*, 3 May 1856, *ibid*.

and departure of women, submit to a census every three years, even every year, and pay for this policing. The census thus became both the means of establishing the crime and imposing punishment.

In the initial encounter with infanticide the argument had been that since the practice existed in violent contradiction to reason and the natural feelings of parents for their children, the remedy lay in finding those principles from the Hindu religion which would allow the universal sentiments of nature and humanity to flourish again.⁵⁷ Now, in place of Duncan's half-admiring references to Rajput *hoormut*, the Commissioner of Banaras referred with revulsion to that 'impurity of thought which made *sala* and *soosur* a term of abuse'.⁵⁸ Yet Rajput rank and its association with a fighting spirit was something which the Company was glad to draw upon to enhance the prestige of service in the Bengal army.⁵⁹ And patriarchal authority was being pruned of its more excessive features so that it could be reinstated within the framework of colonial rule of law.

The availability of statistical information did not of itself bring certain phenomena out of the realm of the domestic and into the sphere of policing. Statistics about suicide in Bundelkhand demonstrated the much higher incidence of suicide for women than men, but this difference was not evaluated as a significant social fact.⁶⁰ The magistrate might suspect that the

⁵⁷ John Shore justified the reliance on social and religious deterrence alone with the argument that 'temporal penalties' would not have abolished a custom 'which existed in opposition to the feelings of humanity and natural affection.' 'On some extraordinary facts', p. 341.

⁵⁸ Commr Banaras to Secy NWP, 3 May 1856, No. 72, Female infanticide, COB. He was referring to a report from C.T. Le Bas, the magistrate of Jaunpur about the 'strange fastidiousness . . . whereby it is a matter of boast and congratulation to a Thakur that no daughter of his had ever been subjected to the embraces of any man, not even of a husband.' C.T. Le Bas to Commr Banaras, 26 February 1855, *ibid.*, *Sala, soosur*: brother-in-law, father-in-law, also terms of abuse. *Hoormut*: sense of esteem.

⁵⁹ Cf. Eric Stokes, *The peasant armed*, 1986; Seema Alavi, *The sepoys and the Company*, 1995; Douglas M. Peers, 'Sepoys, soldiers and the lash', *The journal of imperial and commonwealth history*, 23, 2 (1995), pp. 211-41.

⁶⁰ 'Suicide in Bundelkhand', *SRGNWP*, II, parts XII to XXI, article xxxiv, Agra, 1855. In this correspondence only R. Spankie, the Kanpur magistrate, attributed the higher incidence of female suicide to a cause other than their inherent temperament. He held that when women in Bundelkhand became useless to their families because of sickness and overwork, their life became insupportable. R. Spankie, Offg Magt Kanpur to Secy NWP Govt, 30 January

figures of female suicide concealed incidents of murder,⁶¹ but it was widely accepted that women in India committed suicide for 'trivial domestic reasons', and the family should not be subjected to 'distressing police enquiries'.⁶²

Morality and Domestic Authority: Exclusion and Inclusion in the Criminal Law

Both by the Islamic law relating to zina, 'an unlawful conjunction of the sexes',⁶³ and more generally in pre-colonial governance, the ruler was supposed to punish infringements of the moral and sexual code.⁶⁴ This does not mean that he always did so in idealized conformity with community norms.⁶⁵ Upper-class households, in which the value of women was calculated in different cultural

1855, p. 502. Others said it was because the women were 'deluded objects', they 'appear to commit suicide on the most trivial causes of vexation', it was because of 'the inferiority in mind and in mental firmness of the women in this country', pp. 496, 502, 512-13, 515. Statistics of female suicide were significant only insofar as they followed the statistical movement of male suicide, and thereby warned of over-taxation, a dangerous level of agrarian distress, or could ballast proposals for the intervention of European medical science. Cf. Secy NWP to Commr Allahabad, 16 February 1855, p. 512 for the last.

⁶¹ *Ibid.*, p. 512. Cf. Reports from Bengal magistrates to SP, 15 May 1816, on 'Accidental death by falling into wells', *PP*, 1819, vol. 13, Appendix D, pp. 234-5.

⁶² Reviewing the draft penal code of 1837, the Law Commissioners expressed their concern that the punitive provision for 'voluntary culpable homicide by consent' might encourage police harassment in cases of female suicide. A.D. Campbell reserved his sympathy for those who 'afflicted by such female folly, are, as its alleged instigators, too often harassed most unjustly by the police . . .'. Report of the Indian Law Commission on the Indian Penal code, 23 July 1846, *PP*, 1847-8, vol. 28, p. 56, para 295.

⁶³ This extended to fornication, adultery, and incest. According to the legal school of Abu Hanifa, sodomy was not punishable under the laws relating to zina, but by the doctrines of Abu Yusuf and Imam Muhammad it was. Cf. *NAR*, I, p. 234.

⁶⁴ R. Orme, *Of the government and people of Indostan*, 1753, 1971, p. 36. Gholam Husain, *Seir*, vol. III, pp. 556, 565-6; V.S. Kadam, 'The institution of marriage and the position of women in eighteenth century Maharashtra', *IESHR*, xxv, 3 (July-September 1988), pp. 341-70. Also Malcom, *Memoir*, II, pp. 53-4.

⁶⁵ There could be resistance if he used this intervention to extend his fiscal demands. Cf. *Memoir*, I, p. 565, for one such instance.

terms, had their own methods of disciplining their dependants, but the ruler was expected to endorse this exercise.⁶⁶ Yet there are instances in which the rulers of eighteenth-century states extended their scrutiny for moral infringement into such circles, making it a quite crucial dimension of their authority over such elites.⁶⁷

In contrast, Company officials surveying judicial procedures in Bengal and elsewhere in eighteenth-century India had criticized the prevailing practice of levying fines for sexual misdemeanour as an exercise in judicial venality rather than in public welfare.⁶⁸ Article 31 of the judicial package of 1772 therefore abolished fines for adultery, abortion and similar offences against morality, but went on to state that 'the Court is still to take Cognizance of all such Offences but shall inflict no other punishment for them than Stripes, or Imprisonment or Damages to the party injured.'⁶⁹ Evidently the Company feared that the complete withdrawal of punitive sanctions against immorality might defame its administration.⁷⁰ In addition, the Indian darogha, kazi and muftis who administered the faujdari adalats till 1790 held that the punishment of zina was a magisterial prerogative.⁷¹

⁶⁶ S.P. Sangar, *Crime and punishment in Mughal India*, 1967, p. 183; Par. F. Baltazard Solvyns, *Les Hindous*, 1811, Tome IV, plate 11.

⁶⁷ Kadam argues that the Peshwa administration sought to remodel the marriage practices of Brahmans to Dharmasmriti injunctions. 'The institution of marriage'. Under the Gurkha regime in early nineteenth century Kumaon the husband was 'deemed infamous' and dismissed from service if he did not kill the seducer of his wife. Cf. *NAR*, I, Vakeel of Govt against Beerbhan, 31 May 1819, pp. 388-9.

⁶⁸ Cf. R. Jenkins, *Report on Nagpore*, p. 270; Malcolm, *Memoir*, II, p. 53, n. p. 53; R. Orme, *Of the government and people of Indistan*, p. 36. As I pointed out in the first chapter, this view was shaped by a different sense of the heinousness of such offences, but also by a concern to prevent revenues draining away from the Company.

⁶⁹ Banerji, *Early administration*, appendices, p. 645.

⁷⁰ Officers often reported that British rule was said to have encouraged immorality. 'An Account of the Northern Part of the District of Gorakhpur, Buchanan-Hamilton, Mss Eur D.91, p. 12. W. Bird. Magt Banaras, 20 August 1814, in Home Misc 775, vol. I. Sleeman reported that in 1831 the farmers of Sagar attributed the calamities of the season to an increase in adultery 'arising, as they thought, from our indifference...'. *Rambles and recollections*, vol. I, pp. 235, 240.

⁷¹ *Banaras affairs* (1788-1810), I, pp. 120-1; and *CPC*, VI, 1781-85, 26 May 1782, pp. 180-1. Also *Seir*, III, p. 80. The Naib Nazim of Bengal listed adultery among the cases he considered inappropriate for arbitration, in which punishment 'must depend on the Court of the Adawlut, the Decrees of a Magistrate,

In its judicial reforms of 1772 the Company relegated 'disputes relating to marriage' and to caste to the civil courts, to be dealt with under the personal law, Hindu or Islamic, of the parties concerned.⁷² But it was difficult to consign all disputes relating to the possession of women to civil jurisdiction. Till 1817 the Company's regulations did not formally define the terms of criminal liability for offences relating to zina. Warren Hastings sanctioned a sentence of stoning to death for adultery,⁷³ but by and large Company officials held that Islamic punishments for adultery and fornication were too severe for British norms of rule.⁷⁴ In some respects the colonial state imposed criminal liability on its female subjects on the same terms as men. Women could be given the death penalty for wilful murder, a punishment which some Indian regimes did not impose on women.⁷⁵ The notion that the Oriental woman ripened very early could sometimes overqualify her as an offender, as for instance in cases of homicide, and underqualify her as a victim, as in crimes such as rape.⁷⁶ Yet, in certain circumstances

the Opinion of the Learned and the Officers of Religion'. Memorial from Muhammad Reza Khan, in Controlling Council of Revenue to President and Council, 6 April 1772, *Early administration*, I, pp. 464-5, n. 1. Here adultery probably stands for all cases of zina.

⁷² Article 2 of 1772. Cf. also Reg 4, s 15, 1793.

⁷³ N. Majumdar *Justice and police in Bengal*, Appendix A, p. 316.

⁷⁴ Jonathan Duncan rejected a sentence of a 100 lashes for fornication as too severe under British government. RB to Sub-Secy, 26 March 1791, BRJ 127/73, 29 April 1791. '(H)arsh laws against drunkards and absurd ones against adulterers are in our time, never executed', wrote Henry Strachey, Judge-Magt, Midnapur. Answers to GG Wellesley's interrogatory, 1801, PP, 1812-13, vol. 9, p. 32.

⁷⁵ Cf. W.H. Tone, 'Illustrations of some institutions of the Mahratta people', *Asiatic annual register*, 1798-99, pp. 124-51. Company courts in the Bombay Presidency followed the 'custom of the country' in exempting women from the death penalty till they instituted a different precedent in the case of Luxmee, sentenced to death in 1833. *Reports of criminal cases in the Sudder Foujdaree Adawlut of Bombay*, vol. I, 1827-46, Bombay, 1849, pp. 12, 87.

⁷⁶ By the law of England it was an offence to have sexual relations with a girl under twelve, irrespective of her consent. 'But in India where females come to maturity so early, this doctrine must be received with considerable caution, and must always be a point to be determined by the discretion of the Court, or by a jury.' Note by A.F. Bellasis, Deputy registrar, and compiler of *Reports of criminal cases in the Sudder Foujdaree Adawlut of Bombay*, vol. I, p. 14. The age below which sexual intercourse with a female, with or without her consent was punishable as rape was ten, and in the jurisdiction of the Supreme court in the Presidency towns, eight.

colonial judicial practice could ignore the subjectivity of the female even more completely, as in the offence of enticement, where she was treated as a 'deluded object', incapable of determining her best interests.⁷⁷ Here it was often the male seducer who was singled out for punishment, irrespective of whether or not the woman had left her husband or father willingly. British magistrates and judges sometimes said that the Islamic law on zina and the general treatment of wives in India was so harsh by the standards of a superior civilization that a certain leniency was justified.⁷⁸ But there were two other assumptions here: that the husband's objective in prosecuting for adultery or enticement was to have the seducer punished and to recover the services of his wife, not to have her jailed,⁷⁹ and that the punishment of the woman could be left to her husband or to society in such cases, provided it did not endanger life or limb.⁸⁰

⁷⁷ As a 'deluded object' whether of some male seductor, or of 'superstitious beliefs' and familial pressure as in the case of sati, the legal age of maturity of the female was delinked from puberty and fixed higher. By regulation 7 of 1819, the unmarried girl had to reach the age of fifteen before she could leave the household without making her enticement criminally liable. And a woman had to reach the age of sixteen before she was presumed to have the capacity to give her 'free and informed consent' to burn on her husband's funeral pyre. Cf. Actg Regr NA to Secy Judl Dept, 5 June 1805, *PP*, 1821, vol. 18, pp. 318, 321-37.

⁷⁸ For this kind of reasoning on the question of whether women should be punished for adultery, see Note Q of Macaulay's Draft Penal Code of 1837 (*DPC*) and comments of the Indian Law Commissioners on this, *PP*, 1847-48, vol. 28, p. 76, para 354. In the punishment of a man for adultery or for the enticement of a wife from her husband, the Indian Penal Code (*IPC*) of 1860 held that the consent of the wife was immaterial, but that she was not punishable as an abettor. *IPC*, ch. xx, s 497-8.

⁷⁹ Agent to the Sagar and Narbada territories to Secy, Judl Dept, 17 September 1828, BCrJ P/139/18, 2 October 1828, No. 15. The Commissioner of Kumaon reported that the 'lower classes' levelled a charge of adultery only when it was accompanied by the abduction of the wife. Gowan to Regr NA March 1837, COK, PMJ, Judl letters issued, vol. 9, Book V, UPSA. Also Offg Regr, NANWP to GG, 6 January 1840, Leg Progs, 2 December 1842, part III, No. 104, p. 1427, NAI.

⁸⁰ Cf. COD's judicial letter to Bengal, 28 October 1814, lamenting the decline of paternal authority and the domestic control of husband over wife, and suggesting that the criminal courts keep out of domestic disturbances. *PP*, 1819, vol. 13, p. 23. Governor General Hastings suggested that offences 'which belong to the domestic relations of mankind, such as adultery, seduction and fornication would appear in fact to be more proper objects of a punchait or arbitrators of caste, than a public exposure to trial and punishment,

Company officials in the early nineteenth century often expressed their anxiety that colonial justice was making order too dependent upon state institutions alone.⁸¹ However, such observations also sprang from a concern to reduce the case load in courts by leaving certain issues to society's institutions of justice.⁸² By regulation 7 of 1811, a complaint regarding adultery, fornication and rape could not be lodged with the police darogha but was to go directly to the magistrate, who would decide whether it ought to be investigated.⁸³ The attention of daroghas and zamindars, it explained, ought to be exclusively directed to 'the maintenance of public tranquillity, and to . . . crimes which are most injurious to the peace and happiness of society . . .'.⁸⁴

However, one problem in imposing these restrictions was of how the Company could best conserve the use of its agencies for its own priorities and yet sustain the rhetoric of 'justice in the public interest'.⁸⁵ The need to embed the judicial structure in some frame of moral reference also meant that the realm of sexual-social regulation could not entirely be abandoned to society.⁸⁶ A cluster

in a mode . . . destructive of all moral feeling.' Judl minute of 2 October 1815, *ibid.*, p. 157.

⁸¹ *Ibid.*, pp. 151-7.

⁸² Such suggestions emerged from discussions about ways to draw upon agencies such as the village or zamindar-funded watchman to extend the state's police and information network without increasing costs. Cf. Judl letter to Bengal, COD to GG in C, 9 November 1814, *ibid.*, p. 537.

⁸³ Reg 7, s 2, clauses 2 and 6, s 3, 1811.

⁸⁴ Reg 7, 1811. In other criminal charges the colonial state had assumed a fiscal responsibility for summoning witnesses and paying for their subsistence. Here the complainant had to pay *talabana*, maintenance charges, to the peons who served process and subsistence money for any witnesses he summoned. Reg 3, s 2, cl 1 and cl 6, 1812. If the charge proved to be 'malicious, vexatious or unfounded' he could be punished.

⁸⁵ The second judge of the Bareilly Court of Circuit pointed out that the regulations of 1811 and 1812 discouraging 'frivolous complaints' actually denied the lower classes access to the police and to the courts, and curtailed the influence of these agencies with them. 12 January 1813, BCrJ P/132/43, 12 July 1816. Despite such prohibitions the police darogha continued to intervene in cases of fornication, illegitimate pregnancy, and the 'elopement' of wives and female slaves, applying his powers to the purposes of extortion but perhaps securing some measure of local approbation as well.

⁸⁶ Cf. Henry Strachey, Joint Magt, Midnapur, 30 January 1802, on the need to associate British justice with moral regulation *PP*, 1812-13, vol. 9, p. 194. Also Home Misc 775, vol. 1, pp. 473-89, 710, 728, 984.

of enactments, of 1817, 1819 and 1822, defined the state's regulatory commitment on such issues more precisely.

Adultery and other Narratives of Provocation

The preamble to Regulation 17 of 1817 said it was meant 'to provide for the more effective administration of criminal justice' because 'the Mahomedan law of evidence in some cases (especially in those of zina, including adultery, rape and incest) is such as to render legal conviction almost impossible'.⁸⁷ If the judge of the Court of Circuit felt that a prisoner was fully convicted of zina, but the Islamic law officer did not, the judge could now pass sentence without referring the trial to the higher court.⁸⁸ Jorg Fisch argues that the regulation effectively abrogated the harsh Islamic punishments for zina, but that the severity of the law increased because conviction became easier.⁸⁹ More significant, I think, was the increased authority of the British judge *vis-à-vis* the Islamic law officer, and that the colonial state was now formulating its own terms for the prosecution of sexual offences. The preamble of Regulation 17 maintained a silence about fornication, indicating an effort to bypass it as a public injury. Adultery was distinguished as a private injury, as an offence which affected the rights of the husband alone, and which only he was deemed competent to prosecute.⁹⁰ This established its distinction from rape, which the

⁸⁷ Zina could be established only by the confession of the parties, or by the evidence of four witnesses to the act of intercourse. This testimony had to be repeated four times, over intervals, before the kazi. The confession of the accused could be retracted at any stage and the retraction had to be accepted.

⁸⁸ Cf. BCrJ P/132/64, 16 September 1817, No. 71.

⁸⁹ *Cheap lives*, p. 82. However, Islamic law officers had not been so intractable on the issue of evidence, often declaring a 'strong presumption' of zina on the basis of circumstantial evidence, which authorized discretionary punishment. Cf. Govt. against Thundee, 4 December 1806, and Mussumaut Ujoodhee against Gopeenath and Gungaram, 29 October 1805, *NAR*, I, p. 74.

⁹⁰ Reg 17, s 6, cl 4, 1817. Earlier the Company felt obliged to initiate the occasional prosecution for adultery. *NAR*, I, pp. 296-7, *NAR*, II, pp. 317-18. Subsequently the Nizam Adalat ruled that in a trial for rape the prisoner could not be convicted for adultery instead. Govt against Sirdar Shookl and four boys, 16 August 1839, *NAR*, v, 16 August 1839, pp. 140-3. It was also left to the husband to decide whether to prefer the charge against the man alone, or also against his wife. Reg 17, s 6, cl 4, 1817; CO, No. 126, 29 October 1840 of the superior court of the Madras Presidency. J.B. Pharaoh, *The circular*

magistrate could prosecute as a public offence even if no complaint was made.⁹¹ In addition, rape was termed a heinous crime, which had to be referred to the superior court, the Nizam Adalat, for sentence.⁹²

Yet such distinctions between fornication, adultery and rape could blur again in colonial judicial practice, which treated the woman in question as the polluted vessel of family honour and identified the men of her family as having to deal with the public face of humiliation.⁹³ Rape was taken less seriously as an injury against the woman's sensibilities than as a point for discourses about native codes of honour.⁹⁴ This explains the vast difference

orders of the Foujdaree Udalt, 1805-46, Madras, 1847 (COFA). Cf. also NAR, III, Sheikh Rumzaun against Ruheem Oolah and Musst. Ajoodhcea, 10 February 1830, and NAR, III, pp. 298-300.

⁹¹ Reg 17, s 6, cl 3 and 4, 1817. And after a complaint of rape, no *razinama*, deed of compromise, was permitted between the plaintiff and the defendant. Govt against Fakeerchand, *NAR*, III, pp. 127-8, also, Construction No. 403, 24 August 1825. in *Constructions by the Sudder Dewanny and Nizamut Adawlut*, vol. I, Calcutta, 1840, p. 168. This specification indicates that the victim's family might not prosecute if the rapist offered to marry her or assumed responsibility for her in some relationship of concubinage. For examples, *NAR*, III, 9 September 1834, pp. 318-19 and Juggan Singh vs Shewchurn Sing, 24 November 1838, *NAR*, v, p. 99.

⁹² After the Judge of Circuit deemed the defendant guilty of the crime. Reg 17, s 6, cl 3, 1817. The criteria for establishing rape and referring it as a 'heinous crime' to the superior court was that of penetration, not the degree of physical injury. For example Musst Achnoo against Meeran Shah, *NAR*, II, p. 182.

⁹³ Against this familial and masculine contextualization of rape, its distinction from adultery could be marginal, unless there was demonstrable hurt, as in cases of child rape. While the magistrate was supposed to take cognizance of a rape as a 'public injury' he was also instructed to do so with discretion and with regard to the feelings of the injured party and her family. Reg 17, s 6, cl 3, 1817.

⁹⁴ And these codes of honour were bound up with those of social hierarchy. Macaulay's draft penal code of 1837 sought to restrict judicial discretion, but it allowed the judge to choose a sentence varying from two to fourteen years imprisonment to punish rape. (cl. 360.) The Law Commissioners reviewing the code defended this wide latitude: 'On the one hand . . . the chaste high caste female . . . contaminated by the forcible embrace of a man of low caste, say a Chandala or a Pariah. On the other hand . . . the woman without character . . . easy of access. In the latter case . . . the offender ought to be punished; but surely the injury is infinitely less in this instance than in the former.' Second report on the Indian Penal Code, *PP*, 1847-48, vol. 28, p. 79, para 449.

between the sceptical assessment of actual cases of rape,⁹⁵ and the leniency which British judges demonstrated when a narrative of male violence was constructed as a response to the sexual disgrace of a female relative. It was administrative commonsense, the norm of knowing the people, that the honour of men, particularly among the respectable orders in India depended upon the chaste reputation of their women. Stories about the 'defiled' woman herself demanding to be killed tended to be accepted as confirmatory 'of the anxiety which the natives of this Country feel, on points where female chastity is concerned, to preserve unsullied the reputation of their family.'⁹⁶

By Islamic law a man could put a person to death if he found him in the act of zina with his wife or female slave, as well as the guilty woman.⁹⁷ The British judge would usually explain his decision to acquit the defendant or reduce his sentence to the 'provocation', 'sudden irritation', or 'paroxysm of anger' under which the latter had acted. His reasoning was therefore somewhat different from that of justifiable homicide. It was that the homicide was not a pre-meditated act but one committed under a provocation to masculine feelings of honour.⁹⁸ This was something which

⁹⁵ The official cliché was that in India charges of rape were often fabricated and prompted by malicious motives. Cf. C.R. Baynes, *Hints on medical jurisprudence*, 1854, p. 121, and N. Chevers, 'Report on medical jurisprudence in the Bengal Presidency', *Indian Annals of Medical Science*, October 1854, pp. 243-426.

⁹⁶ Thomas Perry, Magt Etawah to SP, Etawah, detailing his story about a 'respectable Kait' who had beheaded his wife and daughter and committed suicide rather than face a malicious enquiry into the latter's chastity. T. Perry papers, p. 24. Cf. also *NAR*, I, pp. 1-2.

⁹⁷ *Elementary analysis*, vol. I, pp. 247-8, 266, and *NAR*, I, 1805-19, pp. 39-40, 74-5.

⁹⁸ Cf. Kuramat Khan against Ghosoo, 9 July 1807, *NAR*, I, pp. 151-2. However, as I pointed out earlier, certain narratives of provocation were not acceptable. A man could no longer hope to find a sympathetic ear for a story of having put his wife or infant daughter to death to resist the oppression of a revenue collector or some other adversary. The subjectivity of the female offender was explored much more restrictively. The possibility that a woman had murdered her husband because of his violence was seldom investigated. The instigation of some paramour was usually assumed to have provided the inspiration. As Natalie Zemon Davis notes for another context, anger had few acceptable uses for women, and justifications for violence against the husband were very limited. Natalie Zemon Davis, *Fiction in the archives*, 1987, pp. 81-2.

the government wanted to throw in the balance against complaints that its legal system had eroded the punitive authority which kept females chaste.⁹⁹ The homicide, maiming or mutilation of the woman could indicate considerable planning. Sometimes there was long knowledge of the 'illicit' relationship,¹⁰⁰ but violence was inflicted at the point where the woman was actually leaving the household, or after the community put great pressure for punishment.¹⁰¹ But here again, the British judge would often reduce the sentence 'in consideration of all the circumstances of the case'.¹⁰² In these early trials, all male relatives were given the benefit of the extenuating argument of having detected the woman in illicit intercourse.¹⁰³ Subsequently, however, it was the husband alone whose rights were held to have been injured by adultery, and the allegation of sexual wrongdoing given less weight as a mitigating factor for other male relatives.¹⁰⁴

However, it is also necessary to point out that the narrative about the 'provocation' offered by the female victim could be a

⁹⁹ In fact, in the early cases which came to trial, the distinction which British judge made between a justifiable homicide and that for which there were 'mitigating circumstances' could be very blurred. For example, RB to GG in C, 2 February 1792, BRJ P/127/77, 17 February 1792, pp. 202-27.

¹⁰⁰ In the judicial assessment of such cases, the terms adultery, fornication, or 'criminal connection' were imposed on co-habitation arrangements sometimes long condoned till a shift in some circumstance made them the subject of controversy.

¹⁰¹ Kishen Kacchi, whose daughter had eloped with a Rajput, said he had been outcasted and 'being thus left helpless I killed her to vindicate my character.' RB to GG in C, 28 July 1790, BRC P/52/17, 25 August 1790, No. 1.

¹⁰² Cf. Govt against Rujjoah, 27 October 1809, *NAR*, I, pp. 197-8. Here the husband had put his wife and her lover to death after putting them off their guard, but the death sentence was commuted to seven years imprisonment.

¹⁰³ A brother who had killed his sister and her lover finding them in 'adultery' was released. Govt against Gholam Mullik, 22 September 1820, *NAR*, II, p. 48.

¹⁰⁴ Reg 4, s 5, 1822. Fisch argues that the regulation also removed the justificatory plea of adultery for the husband. *Cheap lives*, p. 101. On the contrary, subsequent cases indicate that the regulation had not abolished the concession to the husband's conjugal authority. Cf. Govt against Manick Muhtoo, 8 September 1832, *NAR*, IV, pp. 168-9. On occasion judges continued to reduce the death penalty to imprisonment for other male relatives as well, when they considered that an extreme violation of sexual norms was involved. Cf. *NAR*, III, 14 April 1832, pp. 130-2.

very varied one, and had often to do with the coercive enforcement of her services through control over her movement, her labour and her demeanour. A tale of sexual impropriety was the one most likely to work favourably on the British judge, but these other narratives of provocation and sudden irritation could also serve to reduce the charge from wilful murder to culpable homicide.¹⁰⁵

Seduction, Enticement and Elopement: The Question of Consent

Regulation 7 of 1819 is revealing for the way in which it linked the magistrate's office to two spheres of personal authority, but tressing the guardianship of the head of the household over wife and minor daughter and the master's authority over servants and workers who quit work without 'good and sufficient cause'.¹⁰⁶ The regulation was drafted along the lines of a representation made by J. Eliot, a magistrate of the suburbs of Calcutta, referring to the miseries to which the poorer classes were exposed 'from the wives, children and the female relations of their families being seduced away from them for the purposes of prostitution'.¹⁰⁷ Government, he said, ought to formulate some summary proceeding to give 'protection to the peace of families . . . particularly to enable the poorer Classes of Society to resort to their labours with confidence without the dread of so dangerous a calamity befalling their domestic felicity'.¹⁰⁸ The preamble of Regulation 7 of 1819 stated

¹⁰⁵ Amongst the reasons given for violence: her decision to leave for her parents house or her refusal to return from it, attending a public occasion such as a marriage against the husband's prohibition, *NAR*, i, pp. 231; 344-5; refusing a service, *NAR*, i, p. 110; abusing her husband, *NAR*, ii, pp. 79, 155. For a representative number of such cases, and a criticism of the judicial lenity demonstrated see SP, LP, W. Dampier's, Report on police in the LP for the first half of 1841, *Bengal Judl Progs*, June 1843, No. 100, pp. 103-274, WBSA.

¹⁰⁶ The regulations of this earlier period had a sort of catch-all quality, and individual sections could deal with quite disparate issues. But I think the juxtaposition of themes in Regulation 7 of 1819 is significant.

¹⁰⁷ J. Eliot to Regr NA, 10 July 1819, BCJ 9 July 1819, No. 31, WBSA.

¹⁰⁸ Ibid. In 1814 the Nizamat Adalat had stated that some summary procedure was necessary to deal with disputes over the possession of a wife. Construction No. 148, 31 March 1814, *Construction*, vol. II, Calcutta, 1840, pp. 46-7. The Supreme Court, which applied British law in the jurisdiction of Calcutta, had passed two ordinances, section III of 26 July 1814 and section XVII of 28 October 1814 to punish the seduction and prostitution of married

that 'evil-disposed persons, chiefly women' were being employed to seduce away the wives and daughters of

the fixed inhabitants . . . for the purposes of rendering them prostitutes, or concubines, or of otherwise unlawfully disposing of them, to their serious detriment and to the injury of their husbands and parents.

It empowered the magistrate to punish any person who enticed and took away a married woman from her husband, or an unmarried female under the age of fifteen living with her parents or legal guardians, 'for the purpose of rendering [her] . . . a prostitute or concubine, or otherwise disposing of her in an unlawful manner. . . .'¹⁰⁹ But the regulation also carried overtones of a vagrancy law, protecting the labouring household against the enticements of the traffic in women but also fixing responsibility for the support of women and children.¹¹⁰ By regulation 7 of 1819 the magistrate could sentence a man for desertion and wilful neglect to provide for his wife and children, legitimate or illegitimate, to imprisonment upto a month, but not

if it be clearly shown that the latter (the wife) has forfeited all just claim to support . . . by living in adultery with another person, or by other acts implying wilful abandonment of his protection.¹¹¹

However, there was a degree of legal tolerance for the claims of concubinage at this time because the magistrate could also secure some maintenance for illegitimate children and for the mother while in a state of pregnancy or nursing the infant.¹¹²

women and female children under the protection of husbands, guardians and other heads of families, as well as desertion and neglect of the family. J. Eliot was arguing for the extension of these provisions to the Company's courts.

¹⁰⁹ The magistrate could sentence the abductor to imprisonment for 6 months, and a fine of upto 200 rupees, commutable if not paid to further imprisonment, not exceeding 6 months.

¹¹⁰ Eliot had spoken of women who approached him for help because they had been abandoned in their pregnancy by the father of their child. Some, he said, had actually delivered their child in the court compound. J. Eliot to Regr NA, 10 July 1815. I do not have the material to assess the frequency of such applications for support. For one report of a great increase in applications see, *Report on the administration of Punjab and its dependancies for the year 1867-68*, p. 25, para 79.

¹¹¹ Reg 7, s 3, 1819. The wife's claim to maintenance was therefore contingent on chaste behaviour, and on living under her husband's protection.

¹¹² Reg 7, s 4, 1819. s 4; also J. Eliot to Regr NA, 10 July 1815, BCJ 9

Eliot's communication, and the wording of the regulation, implied that the wives and daughters were 'deluded objects' not aware of their own best interests.¹¹³ The interesting point is that whereas the enticement of an unmarried girl was punishable so long as she was 'under the age of maturity, viz. fifteen years', no such exception was made for the married woman. In criminal law therefore the husband had a lifelong right in the person of his wife. The degree of compulsion which the magistrate could exercise to make the wife return if she did not want to depended on the individual magistrate. In the Kumaon hills, where charges of enticement or adultery were common and the labour of women crucial to the economic viability of the household, wives were regularly restored irrespective of their consent.¹¹⁴ In other districts of the North Western Provinces, the magistrates referred the husband to the civil courts.¹¹⁵ In 1839, at a time when the tendency of legislation was towards the clarification of such areas of discretionary authority, the issue was referred to the two superior courts at Allahabad and Delhi. The majority opinion was that the magistrate could not compel the wife to return and the husband should be referred to the civil courts.¹¹⁶ Yet the 1819 regulation still authorized the

July 1819, No. 312, WBSA. A half century later the Code of Criminal Procedure would not permit the Magistrate to order maintenance for an unmarried woman in a state of pregnancy. However the Magistrate could order a monthly allowance for the maintenance of an illegitimate child. Ch. xli, ss 536-8, CrPC, Tikha Moodai, W.R., vii, 67, in G.E. Knox, *The criminal law of the Bengal Presidency*, vol. 1, 1873, pp. 415-16.

¹¹³ Eliot reported that the women sometimes colluded with the procuress to escape detection, representing themselves as a part of her family. J. Eliot to Regr NA, 10 July 1815, p. 172.

¹¹⁴ Cf. Commr Kumaon to Regr NA, 20 November 1839, COK, PMJ, Judl letters issued, April 1839-July 1842, Sl. No. 36, Book VII, vol. xii, Basta 24, UPSA. Asst Commr Kumaon to Civil Surgeon, 22 February 1839, COK, PMJ, Judl letters issued, vol. 10, Book 6, part 1, UPSA.

¹¹⁵ Secy, Indian Law Commission to Offg Secy, Leg Dept, 18 January 1839, Leg Cons, 28 January 1839, Nos 27-31, p. 42, NAI. In the Bengal Presidency, the practice was more mixed. For the period May 1835-38 in the Bengal Presidency, 1276 applications had been made to the criminal authorities for the restoration of wives, and in 500 cases the women had been returned. The thanedar of Chittagong had been instructed to compel the wife to return if she could offer 'no reasonable ground of objection'. In Faridpur, some of the absconding wives had been punished with imprisonment. Leg Cons, 28 January 1839, Nos 34-42, NAI.

¹¹⁶ Secy Indian Law Commission to J.P. Grant, Offg Secy, GOI, 18

magistrate to punish the abductor of a married woman, whether she had gone willingly or not.¹¹⁷

The distinction of an age of maturity in the female at which she might dispose of her person, and the consigning of the wife's restoration to civil process created some social ripples. The 'lower orders' had found criminal charges a cheaper and quicker means of tackling the defection of a wife or a daughter than civil process.¹¹⁸ The 'respectable classes' objected to the principle of a legal independence in their female relatives as an encroachment on the authority of the head of the household. Yet they also indicated their expectations of magisterial support in exercising this authority over all domestic dependants.¹¹⁹ Sayyid Ahmad Khan used his exegesis on the 1857 rebellion to argue that the husband should be able to call upon the magistrate to restore his wife, irrespective of her consent:

it would be impossible to overstate the disgust which was felt by all Hindustanees at the licence given to women in criminal actions, even married women were recognized in the Criminal Courts as competent. To give a married woman such a liberty was simply to deprive her guardian of all power over her; and not only this but the measure was altogether opposed to the spirit of the existing religions. The remedy provided by a suit in the Civil Courts was little better than useless. Cases of this kind which, according to our belief and practice should have met with prompt attention were so delayed and deferred that the remedy was nearly as bad as the grievance.¹²⁰

January 1839, Leg Cons, 28 January 1839, Nos 27-31, NAI, p. 40. Yet it is significant that five of the seven judges of the Nizam Adalat at Calcutta had held that 'if the Mahomedan or Hindoo law recognised the right of a husband to compel the return of a wife, she should be restored by a Criminal Court', *ibid.*, p. 42.

¹¹⁷ Vasudha Dhagamwar, *Law, power and justice*, second edition, 1992, p. 156.

¹¹⁸ For example, report of Actg Joint Magt Canara, 26 January 1837, Leg Cons, 15 May 1837, No. 2, pp. 52-4, NAI; Lushington to Secy NWP, 11 July 1843, COK, Pre-Mutiny, Judl letters issued, vol. 13, Book 8, 1 August 1842-10 February 1845, UPSA.

¹¹⁹ V. Srinivas, Brahmin and judicial employee in the Madras Presidency, strongly supported criminal provisions to punish adultery, seduction, and breach of contract in servants. Memorandum, 26 November 1838, Leg Progs, 2 December 1842, No. 54, part 1, pp. 581-2, NAI. Cf. also memorial submitted to Bentinck in Madras, Judicial Dept, No. 8, Home Misc, Ootacamund progs, Judl, Cr, June-October, 1834, No. 477, NAI.

¹²⁰ 'The decrees of the Civil Courts for the restoration of the married

Masters and Servants

I am speculating that the other section of Regulation 7 of 1819, dealing with breach of contract in workmen and domestic servants, was the particular contribution of the European household and the European manufacturing tradesman in India.¹²¹ The interweaving of rank with distance from demeaning labour made Europeans in India dependent on a huge number of servants. Racial distance may have precluded the intimacy which could sometimes mediate the relationship of authority in the Indian household of rank.¹²² Membership of the ruling race also meant that the British magistrate could be approached with confidence to enforce the proper demeanour from servants.¹²³ But European masters and mistresses also

woman', he went on, 'are very often waste paper. It often happens that the woman has borne two or three children to the man who abducted her, before her husband can find a trace of her whereabouts.' *History of the Bijpur rebellion*, p. 169 (emphasis added).

¹²¹ A servant law for the magistrate's courts in Calcutta, section 2 of 13 April 1814, and another Calcutta bye-law of 19 October of 1816 to punish breach of contract and attempt at combination by workmen provided the inspiration. The buying and selling of slaves for household labour was also common among British residents in the eighteenth century before anti-slavery sentiment influenced their domestic norms. The connections of such a being to social resources outside the household were more limited than those of the servant, who was accused of entering into combinations with his caste fellows to negotiate on wages and conditions of service. The European master or mistress could not rely on the police and corporal punishment alone to control servants but had to use forms of trial by ordeal and servant *panchayats* as well. Fanny Parkes, *Wanderings of a pilgrim*, II, 1850, pp. 304-6. *Panchayats*: arbitral assemblies.

¹²² An Englishwoman, Mrs Meer Hasan Ali, was eloquent about the relations of deference and intimacy between masters and servants in an Awadh household of rank. *Observations on the Mussulman of India*, vol. I, 1832, pp. 3-4. Yet servants and slaves could be subjected to terrible violence in Indian households as well. Cf. Report of the Indian Law Commrs on slavery, 15 January 1841, PP, 1841, vol. 28, p. 28 and Solvyr, *Les Hindous*, IV, Paris, 1814, p. 6.

¹²³ Upper class Indians may have feared they would jeopardize their dignity by exposing such issues before the magistrate. A judge of Tipperah said Indians of rank did not prosecute their servants for theft for fear that they would have to swear to the truth of their testimony. 23 April 1802, PP, 1812-13, vol. 19, p. 125. To reveal that servants had absconded might suggest a lack of generosity demeaning to the more 'feudalized' ethos of their household. Yet V. Srinivasiah, the Brahmin *seristadar*, had objected to the abolition of criminal breach of contract for servants, stating that Indian masters had special problems because they had to procure servants of their own caste.

assumed a right to subject their servant to corporal punishment without ever supposing he would have the temerity to take them to court. British visitors to India were struck by this feature of Anglo-Indian domestic life. 'Much has been said about slavery', commented the Reverend Charles Acland, chaplain in India from 1842-5, 'I do not believe that any of the slaves in Jamaica were ever worse treated than are the servants of some of our officers here.' A captain had thrashed his groom simply because he hadn't done so for a long time and the man might grow lazy.¹²⁴ 'It is a savage, beastly and degrading custom' wrote W.H. Russell, describing two servants 'covered with bandages and bloody' who had been 'licked' by their master.¹²⁵ Evangelical attitudes towards displays of unregulated violence may have begun to dent the acceptability of such behaviour, but not always.¹²⁶ 'Was it not a pleasure in Lahore', writes Kincaid, 'to watch John Lawrence emerge from morning prayer at the new church and, refreshed by his devotions, fall with furious blows upon the servants awaiting him at the church door?'¹²⁷

Magistrates interpreted transgressive behaviour very broadly in enforcing the unwritten contract upon domestic servants. In Calcutta they used a servant bye-law of 1814 to punish the 'distress and annoyance' caused by cooks who absconded leaving their masters without dinner, coachmen and *syas* who left their masters to take care of their own dogs and horses, wet nurses who exposed children to danger for want of milk, *mehtars* and *mehtaranis* who left privies dirty.¹²⁸ Regulation 7 of 1819 also

Memorandum, 26 November 1838, Leg Progs, 2 December 1842, part I, No. 54, p. 581, NAI.

¹²⁴ Rev. C. Acland, *A popular account of the manners and customs of India*, new edition, 1879, pp. 83-4, 96. Captain Bellew sketches out a Captain 'Marpeer' 'addicted to flogging his servants for what we here should deem trifling offences', but doing so after holding a form of trial. *Memoirs of a Griffin*, 1843, pp. 260-1. Cf. also Nupur Chaudhuri, 'Memsahibs and their servants in nineteenth-century India', *Women's history review*, 3, 4 (1994), pp. 549-62.

¹²⁵ The master he said 'had no fear of any pains or penalties of the law.' *My Indian Mutiny diary*, 1857.

¹²⁶ In his 1841 *Handbook* G. Parbury recommended the dismissal of servants, rather than beating. He also said that the wage rates which used to be fixed by magistrates no longer applied. *Handbook for India and Egypt*, 1841, pp. 473, 481.

¹²⁷ D. Kincaid, *British social life in India 1608-1937*, 1938, reprint, 1939, p. 163, also p. 83.

¹²⁸ D.M. McFarlan, Chief Magt Calcutta, to F.J. Halliday, Offg Secy, Govt of Bengal, 30 April 1838. Leg Cons, 26 November 1838, Nos 6-10, NAI. In

authorized the magistrate to maintain the 'just claims' of workmen and servants upon their employers. But the difference in the terms of intervention confirmed the hierarchy of power very clearly.¹²⁹ Paternalism was imbricated in the fabric of Anglo-Indian domestic life, the common contention was that Indian servants preferred to be whipped, cuffed or kicked rather than dismissed. Magisterial support for a personal subordination in servants may have textured arguments in favour of a hierarchically structured notion of order for India, competing with proposals to restructure society according to the principle of voluntary contract.

Domestic Slavery and a Public Traffic

In 1772, when Warren Hastings and the Committee of Circuit proposed that the penalty for dacoity could be enslavement, they had not found it necessary to take a very defensive position. Slavery in India, they explained, was not the slavery of the American colonies, viewed as a 'horrible evil' in England. '(H)ere slaves are treated as the children of the families to which they belong. . . .'¹³⁰ David Brion Davis points out that ancient slavery had posed a problem both for humanists and orthodox Biblicists in formulating an abolitionist argument. It was resolved by arguing that except for the Oriental despotism of Rome, ancient slavery had existed

Bombay the 'servant regulation' specifically provided not only for breach of duty but also for 'departure from proper demeanour', Reg 12, s 18, of 1827. By a ruling of 4 November 1830 this regulation was made applicable to slaves as well. *Mehtars, mehtarani*: sweepers, sweeperesses; *syce*: groom.

¹²⁹ The servant could be imprisoned for breach of contract. The master could only be asked to pay the wages lost or owing to the servant for discharge 'without good or sufficient cause'. The European British subject could press charges against servants and workmen before the magistrate, but was not subject to this jurisdiction himself. The magistrate therefore could not compel him to pay wages due, though he could use a provision for recovering debt upto fifty rupees. F.L. Beaufort, *A digest*, second edition, part II, 1859, p. 695, para 3426. The judicial endorsement of domestic hierarchy is also evident in a provision by which a theft could be punished as a more aggravated offence if the prisoner was a servant of the person from whom he had stolen, and in the house from which the theft was committed. Reg 12, s 3, cl 4, 1818.

¹³⁰ Committee of Circuit to Council at Fort William, 15 August 1772, in *Supplement*, p. 13. Such images of infantilization and of affective ties were meant to suggest that the coercive component of Indian slavery approximated to a mild paternalistic authority. Cf. F.J. Shore, *Notes*, II, 1837, p. 404.

as a state of mild domestic servitude, leavened by frequent manumissions, and was thus not comparable to modern chattel slavery.¹³¹ In the case of the female slave, however, the argument moved away from the affective dimension, and underlined the theme of civilizational difference and the Company's legal commitment to respect it. Everybody above mediocrity, asserted H. Colebrooke, had household slaves,

and from this class chiefly are taken the concubines of Mussulmans and Hindoos; in regard to whom it is to be remembered, that concubinage is not . . . an immoral state, but a relation which both law and custom recognise without reprehension, and its prevalence is liable only to the same objection as polygamy, with which it has a near and almost necessary connection.¹³²

Coercion over female slaves was said to be connected with the restraint which a man of respectability imposed on all the female members of his household to ensure their seclusion. Even in 1834, despite the evidence from certain regions of widespread agrestic servitude, the Court of Directors formulated their directions for mitigating slavery on the premise that slavery in India was largely domestic.¹³³ And it was also this premise which gave the Indian government considerable leeway in the pace at which it was asked to mitigate slavery by the Charter Act of 1833.¹³⁴ In drafting laws for this purpose the Governor General was cautioned to show a 'due regard . . . to the laws of marriage and the rights and authorities of fathers and heads of families. . . .'¹³⁵

However, the existence of a traffic in slaves had always posed an embarrassment for this picture of domestic slavery. It seemed

¹³¹ David Brion Davis, 'British emancipation as a moral dispensation' in 'Humanitarianism or control', *Rice university studies*, Winter, 1981, vol. 67, No. 1.

¹³² Note on slavery, 1812, *PP*, vol. 51, 1837-38, p. 310.

¹³³ 'Of the two kinds of slavery, predial and domestic, there is not a great deal of the former. . . . Domestic slavery in India is generally mild.' Public letter to India, 10 December 1834, *PP*, vol. 51, 1837-38, p. 22.

¹³⁴ For criticisms that the slavery clause in the India Bill as originally drafted might be construed to cover the inspection of *harems* and *zenanas* see Benedicte Hjejle, 'The social policy of the East India Company', D.Phil, Oxford, 1958, pp. 204-8. The Duke of Wellington warned against alienating Muslim soldiers who kept slave concubines. D.R. Banaji, *Slavery in British India*, 1933, p. 14.

¹³⁵ Section 88 of Statute 3 and 4 Will. 4, chap 85.

to threaten the integrity of the domestic unit and to foster illegitimate sources of supply. Many officers argued that an unregulated right to sell and buy slaves fostered the crime of kidnapping children, the inveigling of women from their families, and the sale of females for prostitution. It encouraged husbands to treat their wives as disposable property and put pressure on debtors to sell their children.¹³⁶ In nineteenth-century north India this traffic was strongly marked by an age and gender preference in favour of women and children, and females commanded a much higher price than males.¹³⁷ Women and children were easier to control than the adult male,¹³⁸ and female slaves could be drawn upon not only for their labour but also for their sexual and reproductive capacities, whether as household menial, concubine, or prostitute.¹³⁹

In the North Western Provinces and in many districts of the

¹³⁶ For such arguments cf. Magt Mirzapur to Banaras CC, November 1796, BCrJ 30 December 1796, No. 21, WBSA; T. Brooke, Agent at Bareilly to Chief Secy to Govt in Pol. Dept, 17 May 1811, BC F/4/369, p. 41; Lt. Col. Young, Pol. agent at Gharwal to Agent to Govt at Agra, 10 December 1835, PP, 1837-38, vol. 51, p. 70; W. Leycester to Regr NANWP, 15 April 1836, PP, 1841, vol. 28, Appendix II, p. 330; and Observations of C.H. Cameron and F. Millet, in Indian Law Commissioners to GG Auckland, 15 January 1841, *ibid.*, pp. 203-9.

¹³⁷ For the higher proportion of females in the trade: T. Brooke to Chief Secy, 17 May 1811, BC F/4/369; Political letter from Bengal, 31 December 1832, No. 14, PP, 1837-38, vol. 51, p. 4. The Banjaras paid a higher price for female children because they were more profitable. Mrs Guthrie, *Life in Western India*, 1881, p. 14. Also Commr Banaras to Secy NWP, 22 June 1846, WP, Cr Judl Progs, P/232/53, 7 September 1846, No. 46. Some magistrates used the specific classification 'female child stealing' in their police reports. For prices see PP, 1841, vol. 28, pp. 36-8 and Appendix 1, No. 2 and No. 20, pp. 225, 248.

¹³⁸ The British resident at Gwalior reported that children were more in demand, because they would forget their parents and their birth place whereas adults would seek opportunities to run away. Resident Gwalior to Secy, Macnaghten, 30 July 1832, PP, 1837-38, vol. 51, p. 97.

¹³⁹ Cf. evidence of Tek Loll, *mukhtiar*, of the Sadar Diwani Adalat, Calcutta, PP, 1841, vol. 28, Appendix I, No. 2, p. 225 and J. Malcolm, *Memoir*, II, reprint, 1970, pp. 199-203. On the supply side, the hard pressed rural household, threatened by famine, or by a pressing rent or revenue payment, would sell the female child more easily than the male one, because the daughter would, at some point or the other be transacted out of the household. F. Buchanan reported that the poor of Rangpur sold their sons with greater reluctance than their daughters because they constituted a greater resource for their old age. PP, 1841, vol. 28, p. 31.

Bengal Presidency the British magistrate was seldom called upon to intervene between masters and slaves.¹⁴⁰ But it is interesting that the complaints which were lodged were about female slaves who had absconded or eloped, or concerned prostitutes and dancing girls who asked for emancipation.¹⁴¹ In the early decades of Company rule magistrates had often returned such women, even if their owners were brothel-keepers or managers of dance troupes.¹⁴² Subsequently, when they refused to intervene, their assistance was sought in a different form. Deeds of conveyance in slaves began to be replaced by deeds of lease.¹⁴³ The joint magistrate of Faridpur reported that Muslims of the middling classes went through the *nikah* ceremony with female slaves so that they could ask for their restoration as wives if they ran

¹⁴⁰ Cf. H.B. Harington, Regr NANWP, to Secy Indian Law Commission, 18 March 1836, and responses of Magt Tirhut, Monghyr, Patna, Shahabad, Saran in PP, 1841, vol. 28, Appendix II. Report of the Indian Law Commissioners, 1 February 1839, Appendix II, pp. 180-200. But the magistrate of South Bihar referred to civil cases regarding the sale of whole families of predial slaves. *Ibid.*, p. 321.

¹⁴¹ G. Mainwaring to Regr NANWP, 16 February 1836. W. Okenden, Magt Moradabad, to Regr NANWP, 30 November 1835, Commr Delhi to Regr NAA, 22 December 1835. Cf. also 'Statement of cases of slavery before the Magistrate of Patna', November 1828 to June 1835, PP, 1841, vol. 28, Appendix II, No. 86, No. 124, No. 134, No. 76.

¹⁴² For an example from Farukhabad in 1836, see PP, 1841, vol. 28, Appendix II, pp. 330-2. F.J. Shore said some officers allowed brothel keepers to institute claims for the recovery of runaway slave-prostitutes, others did not. Shore, Commr Jabbalpur, to Regr NANWP, 8 March 1836, *ibid.*, p. 365. In Delhi there was a shift in stance, and slave girls who ran away from the Mughal emperor's palace were emancipated if they alleged mistreatment. Mughal emperor to Resident, Delhi, 2 August 1828, T.T. Metcalf to Resident at Delhi, 2 August 1828, PP, 1837-38, vol. 51, pp. 39-40. However, officials could display a remarkable scepticism about the real mistreatment of female slaves, suspecting the 'instigation' of some paramour or chafing at 'mere restraint'. E. Colebrooke, Resident at Delhi, to Chief Secy, 5 December 1828, *ibid.*, pp. 41, 464-5.

¹⁴³ Cf. Magt Bakarganj to Regr NA, 10 September 1836, PP, 1841, vol. 28, Appendix II, pp. 14, 288. The regulations of 1811 and 1832 which restricted the slave traffic and the notion that magistrates would uphold debt-bondage more willingly than a deed of sale began to change the forms of transfer even before the abolition of slavery. Yet deeds registering transactions in young females, even outright sales, seem to persist, an indication that the stability of this commerce did not depend upon the legal enforcement of property right.

away.¹⁴⁴ The owners would charge the runaway slave with theft or claim her clothes and jewellery as their property in the civil courts.¹⁴⁵ The grids of property and power dominating women in the domestic sphere extended, though in different ways, to structure the life of the prostitute or dancing girl as well.¹⁴⁶

Despite the regulations of 1811 and of 1832 restricting the slave trade,¹⁴⁷ certain regular lines of supply persisted.¹⁴⁸ Any correlation between the revenue demand in British territory and the sale of children was disclaimed, the necessity being attributed only to natural calamity.¹⁴⁹ Yet I would speculate that the decision taken in a peasant household to sell a daughter, whether as servant, wife, or prostitute, could still be connected to the timing

¹⁴⁴ W.H. Martin to Regr NA, 18 January 1836, PP, 1841, vol. 28, Appendix II, No. 46, pp. 292–3.

¹⁴⁵ PP, 1841, vol. 28, Appendix II, p. 359; W. Okender to Regr NANWP, 30 November 1835, *ibid.*, No. 124, p. 354; T. Metcalf to Regr NANWP, *ibid.*, pp. 233–4, 358; PP, 1837–38, vol. 51, p. 440.

¹⁴⁶ For disputes over the wife's property rights in her ornaments, supposed to be secured to her by the Hindu law, see F.J. Shore, *Votes*, II, p. 397. Veena Talwar Oldenberg may have given us rather too rose-tinted a picture of prostitution as a space for mutual female nurture. 'Lifestyle as resistance', in D. Haynes and G. Prakash, *Contesting power*, 1991, pp. 23–61. Malcolm gives a harsh picture of the courtesans' existence, noting the coercive barriers if they wanted to leave their owner. *Memoir*, II, p. 203. However, some courtesans could acquire considerable influence in the service of a certain upper class lifestyle. References to dancing girls and prostitutes leaving their possessions to their daughters, real or adopted, indicate that some of them acquired and retained property.

¹⁴⁷ Regulation 10 of 1811 prohibited the sea-borne trade, and the import or export of slaves from British territory for the purposes of traffic. It did not prohibit the buying and selling of persons who had not been imported into British territory. Construction No. 11, 5 October 1814, *My notebook*, 1848, p. 478. Ironically, the rapid expansion of British territory in India thereafter meant that the importation or exportation of slaves from annexed districts was no longer illegal. This anomaly was addressed by Reg 3 of 1832, formulated for 'the entire prohibition of the removal of slaves for purposes of traffic from one part of British territory to another . . .'

¹⁴⁸ Cf. Thomas Bacon, *First impressions and studies from nature in Hindostan* (1831–36), 1837, vol. II, p. 181.

¹⁴⁹ In contrast the oppressive exactions of the Gurkha regime were blamed for the traffic in slaves from Nepal and Kumaon into Rohilkhand and from Garhwal down to Hardwar in the early nineteenth century. Cf. Colebrooke's minute of 1812, in PP, 1837–38, vol. 51, p. 313. Sleeman charged the Awadh troops with selling off women and children for revenue arrears. *JTKO*, I, p. 87.

and level of a revenue installment.¹⁵⁰ And while Company rule may have curtailed the lavish establishments of the upper classes, it also generated a market for women around the cantonments of the Bengal Army.¹⁵¹

In 1812 Colebrooke had tried to argue that the slave traffic within India was not fuelled by the profit motive, that low prices indicated low demand, and that parents sold their children not out of avarice but to save their lives in famine.¹⁵² Yet re-sale prices could be high in areas of bustling commerce with a demand generated by affluent households.¹⁵³ And the sale of women and female children as concubines, worse still as public prostitutes, remained an uncomfortable aspect of Indian slavery.¹⁵⁴ Prostitution carried the whiff of

¹⁵⁰ In Kumaon, a couplet composed by Krishan Pandey during the tenure of Commissioner Traill correlated the decision to give/sell daughters in marriage to the high interest rate on grain. In A.K. Mittal, *British administration in Kumaon Himalyas*, 1986, p. 42.

¹⁵¹ The deployment of standing mercenary armies in eighteenth-century state building expanded the demand for prostitutes and dancing girls, but also for concubines, from men who spent long periods away from home and had money to spend. For settlements of prostitutes for soldiers in Kumaon under the Gurkha dispensation cf. Muneeram against Luchmun Rajput, 4 September 1822, *NAR*, II, pp. 200–2. The patronage of young British officers who came in from England between 1778–85 encouraged dancing girls to quit the cities for the cantonments, Charles D'Oyly, *The European in India*, 1813, notes to plate XV. Cf. also Hasan Shah, *The dancing girl*, 1790, transl. Qurratulain Hyder, 1993, p. xii, p. 97. For this feature of the life of the Company *sipahi* see J. Lunt (ed.), *From sepoy to subedar*, 1970, pp. 56–8; Francis Buchanan, *An account of the district of Bhagalpur in 1810–11*, 1939, p. 193; and entry of 30 July 1857, *Press list of 'Mutiny papers'*, 1921, p. 387.

¹⁵² PP, 1837–38, vol. 51, p. 313.

¹⁵³ Malcolm, *Memoir*, II, Delhi, 1970, pp. 200–2; Political agent, Harauti Agency, Kotah, to AGG, Ajmer, 22 June 1832; translation of an extract from the Gwalior *akbbar*, 13 July 1832, PP, 1837–38, vol. 28, pp. 55, 58–9.

¹⁵⁴ An earlier generation of officials could still wave away the sale of females as entertainers or prostitutes, or their dedication as temple dancers as a matter of civilizational difference regarding morality. Cf. Colebrooke's minute, 1812, PP, 1837–38, vol. 51, p. 312; Committee to revise Bombay regulations to Secy, Bombay Govt, 13 July 1825, PP, 1837–38, vol. 51, p. 455; Act Regr, Faujdari Adalat to Chief Secy, Govt of Fort St. George, 19 November 1839, Leg Cons, 16 December 1839, Nos 20–2, NAI. Evangelical attitudes, as well as a more racial stance on cultural difference made it difficult to express such views. Missionaries and officials who wanted intervention, strengthened perhaps by the support which British women were giving to abolition, raised the theme of immorality and sexual compulsion. Cf. D. Banaji, *Slavery in British India*, p. 252; Leg Progs, 11 February 1839, No. 16, p. 396, NAI.

an immoral commerce and could not easily be assimilated to the domestic realm of marriage and reproduction.¹⁵⁵ However the figure of the female slave could be invoked for the argument against abolition as well, in her position as concubine or attendant in the *zenana*. Restraint over the female person was said to be so linked to rank and respectability that the law and magisterial authority were helpless before 'national custom'.¹⁵⁶

Yet, as I argued earlier, the Company had made some moves to police this traffic, on account of pressures which did not entirely derive from the anti-slavery movement in Britain. These sprang from a problematic endeavour to distinguish between a domestic sphere in which male property rights in women and children could be safely endorsed, and an 'illegitimate' public commerce in their person.¹⁵⁷ When colonial magistracy intervened against the inveigling of minor daughters and wives, it did so to institute a domestic terrain separate from this traffic in women. So the payment of money for a bride was acceptable, but the resale of the wife by the husband, or of the widow by her son or other male relative, was prohibited as a misdemeanour.¹⁵⁸ And if this sale was into slavery,

¹⁵⁵ Colebrooke argued that slavery in India did not impede marriage or reproduction, but had to concede that the case of concubines and prostitutes was different. *PP*, 1837-38, vol. 51, p. 311. Yet there were officials who described prostitution in India as safely confined within caste-like communities which did not contaminate the domestic sphere, and in fact channelized desires which would endanger conjugal life. See observations of Commr Chaplain, in resolut of Bombay Govt, 30 June 1830, *ibid.*, p. 452; also Judge-Magt Jaunpur, 15 August 1815, *Home Misc*, 775, 1, p. 635.

¹⁵⁶ 'The protection which the magistrate has to offer females is very small, but this arises chiefly from the habits of the people, and the constitution of their society. Any remedy in regard to them must be rather the work of time and of general improvement, rather than of any direct legislative interference.' Auckland to Hobhouse, President Board of Control, 15 November 1838, *Mss Eur* 213/9, pp. 264-5. And again, 'The abominations which grow out of the maintenance of the *zenana*, and the troops of the dancing girls are of another character, and, for the most part illegal, but from national customs, difficult to check.' Auckland to Hobhouse, 13 January 1839, *ibid.*, p. 357. *Zenana*: women's apartments.

¹⁵⁷ By Reg 53, s 2 of 1803, any punishment short of death could be inflicted for kidnapping a child from its guardian for illegal purposes.

¹⁵⁸ In 1823 the sale of wives by their husbands and of widows by their heirs and relations was forbidden in Kumaon. F. Whalley, *British Kumaon, the law of the extra regulation tracts*, 1870, reprint, 1991, p. 14. In the hilly region bordering Ajmer, where British superintendents sought to 'settle' the

then it was treated as a more serious offence, especially if it was into non-British territory.¹⁵⁹ At the same time, British officials did not want to encroach on bride-price or on monetary compensation for the husband whose wife had been enticed away by another man. Magistrates and judges were not supposed to treat this transaction as a sale but as compensation for marriage expenses or redress for dishonour.¹⁶⁰ But should this compensation be negotiated through the courts alone to prevent collusive sales?¹⁶¹ In the long term, colonial concerns to standardize and immobilize the conjugal relationship may have coalesced with denigrations of bride-price and widow concubinage surfacing within certain communities.¹⁶²

One problem about inspecting this traffic in women and children was preventing the police from abusing their powers.¹⁶³ Brothel-keepers or owners of dance troupes would sometimes register the names of all the *laundies* they purchased or procured at the police station, ostensibly to secure themselves against the

Mhairs (Mers) and wean them away from their 'plundering ways', they tried to induce their panchayats to prohibit the sale of a wife or a widow. *Agra Political Progs*, 18 February 1835, No. 20, *Papers relating to infanticide in India*, 1834-42, 1843, pp. 36-7.

¹⁵⁹ Cf. C.G. Mansel, Magt, Agra to Resident, Gwalior, 27 June 1832, *PP*, 1837-38, vol. 51, p. 58.

¹⁶⁰ Lt. Col. Hall Supdt Mhairwara (Merwara) to Secy to Govt, 16 December 1834, *Foreign Dept. Pol. Cons*, 4 May 1835, Nos 43-5, *NAI*. See also Commr Kumaon to Regr SDA, 20 November 1839, No. 26, *Pre-Mutiny, COK*, Judl letters issued April 1839-July 1842, Sl. No. 36, Book VII, vol. XII, Basta 24, *UPSA*.

¹⁶¹ The chiefs of the Hill states in Punjab province were asked to prevent the taking of *reet*, the bride-price, from the abductor of a wife except where it was officially awarded as compensation. *Leg Cons*, 20 February 1852, Nos 45-6, *NAI*. But W. Edwardes, Superintendent of the Hill states said that this recognition for *reet* encouraged adultery. W. Edwardes to Secy Punjab, 24 July 1851, *ibid.*

¹⁶² See Lt. Col. Hall to Secy to Govt, 16 December 1834, *Foreign Dept. Pol. Cons*, 4 May 1835, Nos 43-5, *NAI* for a suggestive reference. M.A. Anderson suggests that colonial legislation may have restricted the latitude which women of low caste groups had to obtain divorces sanctioned by custom. 'Work construed', p. 93.

¹⁶³ It was feared that the registration of legitimate sales, a practice prevalent in pre-colonial governance, might be perverted to the advantage of brothel keepers, or suggest that the Company countenanced the traffic. For a prohibition of the former practice of registering the sale of children at the police thana, cf. G.C. Cheap, SJ Mymensingh to Regr SDA, 19 September 1836, *PP*, 1841, vol. 28, Appendix II, No. 47, p. 298.

charge of inveigling wives and minor daughters. But their real object, wrote one Superintendent of Police

is to induce a belief that they have a legal claim over these girls, whom they frequently retain against their wills by the aid of the police supporting such a registry. . . . (They) refuse to part with them unless they are reimbursed for what they demand as their expense for feeding and clothing them; using this registry as a means of intimidating the young females into compliance.¹⁶⁴

The most difficult issue in putting a boundary around the domestic sphere was that the Company had for long acknowledged the right of parents to sell their children, in the sense of accepting this transaction as a legitimate source as against supply by kidnapping or inveigling. The drought which ravaged Bundelkhand in 1833-4, and subsequently large patches of northern India in 1837-8 constituted a crucial conjuncture in discussions about the sale of children. Should government clearly declare that it would not enforce any right of ownership arising from the purchase of destitute children?¹⁶⁵ If it did so, was it bound to provide some legal or institutional alternatives to prevent starvation deaths? Government had committed itself to some official poor relief in the form of public works for the able-bodied, but the helpless were to be left to private benevolence.¹⁶⁶ This was the time when missionaries began to set up orphanages for abandoned children.¹⁶⁷ Magistrates now began to use these instead of the earlier practice of handing them over to Indian families who offered to support them 'for

¹⁶⁴ CO, SP, LP, 31 December 1841, prohibiting the 'general practice' adopted by darogas of registering females kept by 'bawds, keepers of brothels . . . or persons removing loundies or alleged slave girls from place to place. . . .'
The darogab's manual, compiled by J.C. Marshman, 1850, pp. 177-8.

¹⁶⁵ In a construction of 27 June 1834 the Nizamat Adalat had stated that the purchase of children not for importation and sale as slaves was not punishable, but if they chose to run away the Magistrate was not to interfere to restore them. Tucker, *My notebook*, p. 478. Some magistrates seem to have issued proclamations to this effect. Offg Secy, NWP Govt, on police report of Agra Divn for the first six months of 1836, Commrs Office Agra, Judl Dept, 1829-39, Basta 164, RAA.

¹⁶⁶ C. Blair, *Indian famines*, 1874, reprint, 1984, pp. 46-7.

¹⁶⁷ For a discussion of the orphanage at Sikandrabad as a social experiment see, G. Parbury, *Handbook for India*, 1841, pp. 101-2. The children were not always amenable to their social and moral makeover. Cf. Leupolt, *Recollections*, p. 170 and Fanny Parkes, *Wanderings of a pilgrim*, II, 1850, p. 295.

reasons of charity'.¹⁶⁸ An alternative frequently suggested was that some form of apprenticeship could be substituted for the sale of children into slavery.¹⁶⁹

Against the backdrop of large numbers moving on the roads in search of food and employment, W.H. Sleeman, Commissioner for Thuggee and Dacoity, arrived at the 'discovery' of yet another form of thuggee, for which he coined the term *Megpunnaism*, the murder of poor parents to acquire their children for sale.¹⁷⁰ Sleeman used his revelations to press for measures to prohibit the selling and buying of children.¹⁷¹ But his account also had an undercurrent of anxiety about the children of 'respectable families' cast into a downward social spiral by this traffic. He said that prostitutes sought children of high-caste families because they had been kept out of the sun and were fair. Once sold they became outcastes and usually became Muslims 'to secure a recognition of civil and social rights in some circle of society above the very lowest'.¹⁷² In her account of the withdrawal of legal recognition from slavery,¹⁷³ Nancy Cassels passes over prostitution and Megpunnaism as the more sensational aspects of Indian slavery. Yet such inflections of immorality and crime were as crucial to the argument for intervening in slavery as 'the juridical discourse of freedom' which Prakash stresses.¹⁷⁴ However, government's

¹⁶⁸ SP, LP to Secy Bengal, 18 February 1844, No. 30, Under-Secy to SP, LP, 11 March 1844, No. 32, BCrJ 11 March 1844, pp. 444-6, WBSA.

¹⁶⁹ The reasoning was that the buyer would recompense himself for his outlay and the children could eventually exercise their own choice in the disposal of their person. PP, 1837-38, vol. 51, p. 438. F.J. Shore, *Notes*, II, p. 405. Observations of C.H. Cameron and F. Millet in Report of the Indian Law Commissioners to GG Auckland, 15 January 1841, PP, 1841, vol. 28, p. 208. A. Amos, Law Commissioner, second minute, 10 January 1842, Leg Cons, 24 January 1842, Nos 1-8, NAI.

¹⁷⁰ *Report on the system of Megpunnaism*, 1839, pp. 14-15. This was the decade in which the thuggee department had taken shape as a police operation against bands said to belong to hereditary fraternities who inveigled travellers to murder and rob them. See chapter five.

¹⁷¹ *Ibid.*, p. 5.

¹⁷² *Ibid.*, p. 4.

¹⁷³ 'Social legislation under the Company Raj'.

¹⁷⁴ Gyan Prakash, *Banded histories*. The Government of India opposed the formal abolition of the master's right of corporal chastisement. However arguments about the criminal ramifications of the sale of children had left their impress for the Law Commissioners were asked for a note on this traffic. J.P. Grant, Offg Secy GOI, to Indian Law Commrs, 27 May 1839, PP, 1841,

reluctance to extend its responsibility for failure relief continued to constrain legislation.¹⁷⁵ Act V of 1843 withdrew legal recognition for slavery but it did not make the sale of children by their parents a cognizable offence.¹⁷⁶ However the courts would not recognize any rights of ownership arising from this transaction. It was only much later that section 372 of the Indian Penal Code of 1860 defined the sale, hire or disposal of a minor 'for the purpose of prostitution, or for any unlawful and immoral purpose' as an offence.

Domestic Subordination and Legal Rationalization

Macaulay's draft penal code of 1837 had offered one way by which civil equality could be extended via the criminal law, by disengaging magisterial authority from any commitment to uphold spheres of personal subordination. In the Draft Penal Code of 1837 the chapter on General Exceptions to punishment did not include any distinction between freeman and slave: 'no act falling under the definition of an offence should be exempted from punishment because it is committed by a master.'¹⁷⁷ Though this would not abolish slavery as a civil status, Macaulay hoped it would impel the master to reconstitute the relationship on the premise of voluntary contract.¹⁷⁸ The Court of Directors swooped on this proposal with relief and directed the government to 'lose no time' in passing an enactment.¹⁷⁹

What is interesting is the way in which the ensuing debate about the master's right to inflict corporal punishment on his slave spilled over into discussions about the coercion which a head of a

vol. 28, Appendix XX, No. 5, pp. 592-3. Also Auckland's minute of 6 May 1841, BM Adl Ms 373713, p. 107.

¹⁷⁵ See G.C. Cheap, SJ Mymensingh to Regr SDA, 19 September 1836, PP, 1841, vol. 28, Appendix II, No. 47, pp. 296-9 and J.M. Macleod, *Notes on the report of the Indian law commissioners*, 23 July 1846, London, 1848, for representative arguments against endangering poor relief by interfering in the sale of children by their parents.

¹⁷⁶ Cf. Home Judl, 25 November 1859, No. 11, NAI and Home Public, 30 November 1864, Nos 62-3, NAI.

¹⁷⁷ Note B, Draft Penal Code (DPC), PP, 1837-38, vol. 41, p. 546.

¹⁷⁸ Ibid.

¹⁷⁹ Despatch of COD, 26 September 1838, PP, 1841, vol. 28, Appendix XX, No. 1, p. 590.

household might legitimately exercise over wives, concubines, and servants, to exact certain services and to enforce certain codes of respectability.¹⁸⁰ The Law Commissioners contended that certain forms of coercive authority were recognized in the personal law of the Hindus and Muslims, and that these had to be acknowledged in the criminal courts as well. Significantly, it was the analogy of the husband's conjugal right that they drew upon to illustrate their position:

We may employ again the illustration of marriage. . . . We cannot doubt that under the rule a Criminal Court would hold a Hindoo justified in exercising such a restraint towards his wives as would amount to a false imprisonment if exercised towards other women. And if that be so the same Court ought certainly to deal in the same way under the Construction with the exception or defence arising out of slavery.¹⁸¹

Three of the Law Commissioners, A. Amos, D. Eliot and H. Borradaile, warned that abolishing the master's powers to chastise his slave 'in moderation' would have a domino effect on other structures of authority in the household.¹⁸² Amos contended that such an enactment would vest the slave with greater autonomy than the servant as the servant was still subject to corporal chastisement and magisterial discipline.¹⁸³ Cameron was

¹⁸⁰ Such analogies may also have been invoked to remind the Court of Directors and the Home government of the cautions they had issued about respecting domestic boundaries and the 'authorities of fathers and heads of families' in mitigating slavery. 'There are certain kinds of restraint required according to native ideas, for the government of families, and forming, according both to law and custom, part of the rights of heads of families, Mussulman and Hindoo, which are not to be included under the title slavery.' Despatch from COD, 16 December 1834, cited in report of Indian Law Commissioners, 15 January 1841, *ibid.*, p. 5.

¹⁸¹ *Ibid.*, pp. 5-6.

¹⁸² It would end 'that kind of domestic discipline by restraint over the slaves, especially the female slaves, which has hitherto been considered requisite for the due government of a family according to native manners.' Such familial disorder 'would not admit of compensation.' Observations of Amos, Eliot and Borradaile in Report of the Indian Law Commrs, 15 January 1841, *ibid.*, p. 219.

¹⁸³ Amos was also unwilling to start defining the powers of masters over servants, an issue which Macaulay's draft code had placed on the agenda. Minute by A. Amos, 1 April 1839, Leg Progs, 8 April 1839, No. 17, pp. 69-71, NAI. For similar views, Minute by W.W. Bird, 8 April 1839, No. 18, *ibid.*,

in the minority when he supported the idea of a specific enactment to abolish the master's powers of moderate correction.¹⁸⁴ The regulations for the punishment of servants, he said 'were not good regulations', so they should not form the standard against which to measure the legal position of slaves.¹⁸⁵ Cameron also wanted the proposed law to contain a 'distinct negation' of the 'monstrous' right of the Muslim master to the sexual use of his female slaves.¹⁸⁶

Macaulay's penal code had also indicated other directions in which forms of personal subordination could be replaced by voluntary contract on the premise of legal equality. One of its striking innovations was the exclusion of adultery as a criminal offence. This jettisoned the husband's privilege of invoking the criminal law for the redress of a private wrong.¹⁸⁷ The draft code therefore broached the issue of legal equality for women in the marital contract, but indirectly, by withholding penal sanctions from the husband.¹⁸⁸ It also excluded the enticement of the adult

pp. 75-6. The second Law Commissioner T.C. Robertson concurred with Amos but felt they had no option but to promulgate an enactment. *Ibid.*, p. 73.

¹⁸⁴ Such a power he said, had a liability 'to run into excess when it is exercised against adults', an argument which suggested that such forms of personal subordination conflicted with rule of law. Minute by C.H. Cameron, Leg Dept, 11 February 1839, No. 16, in Leg Progs, 4-25 February 1839, p. 395, NAI. However, so far as children were concerned, contemporary discussions around apprenticeship arrangements, and the judicial punishment of minors, indicate that corporal punishment remained a legally acceptable corrective for them. See chapter six.

¹⁸⁵ Observations of C.H. Cameron and H. Millet, Report, 15 January 1841, PP, 1841, vol. 28, p. 199.

¹⁸⁶ Minute of C.H. Cameron, 1 February 1839, Leg Dept, 11 February 1839, No. 16, Leg Progs, 4-25 February 1839, p. 396, NAI. Amos argued that the alleged right of the master to prostitute his female slave would have to be made a substantive offence, and that this would exceed their instructions. Minute of Mr Amos, 1 April 1839, Leg Progs, 8 April 1839, No. 17, NAI, p. 71.

¹⁸⁷ Macaulay's position was that as an offence against morality the criminal law could not punish adultery in a measure adequately representative of society's disapproval. Note Q, on the Chapter of offences relating to marriage, DPC, pp. 579-80. His other argument was that the penal law should not buttress the marital contract in India because it was made from a position of legal inequality. The husband could engage in polygamy but the wife's infidelity was punished. DPC Note Q, p. 580.

¹⁸⁸ However the draft code accepted that the marital contract gave the

wife from the definition of kidnapping, thereby retracting the operation of Regulation 7 of 1819.¹⁸⁹ However the code also pruned the paternalist aspects of the criminal law in a way which would have eroded the wife's claims to maintenance. It excluded, though without any discussion, that provision of Regulation 7 of 1819 which allowed the magistrate to punish a man for wilful neglect to provide for his wife and children.

In subsequent assessments of the draft code, these innovations had few defenders. A substantial body of official opinion held that the criminal law must continue to endorse paternal and conjugal rights over women and that abduction and adultery should be retained as offences.¹⁹⁰ This was a recommendation incorporated in the Indian Penal Code as it was eventually enacted in 1860.¹⁹¹ The 1837 draft code also removed the criminal provision for punishing breach of contract in domestic servants.¹⁹² However, criminal breach of contract, deemed inappropriate for household

husband an unlimited right of sexual access to his wife, without any qualification as to her age. DPC, Clause 359, (5) and exception. In their review of the draft code the law commissioners suggested it might be necessary to prevent husbands taking premature advantage of their marital rights. Second report on the Indian Penal Code, PP, 1847-48, vol. 28, pp. 78-9, paras 444-5. IPC s 375 introduced the exception of age: 'Sexual intercourse by a man with his own wife, the wife not being under 10 years of age, is not rape.' (Emphasis added.)

¹⁸⁹ The draft penal code recognized the offence of kidnapping a child, and of kidnapping a person for rape, 'unnatural lust' or slavery (cl 354). But it held that the enticement of a grown person to go from one place to another place within the Company's territories could be the subject of a civil action, and under certain circumstances, for a criminal prosecution, but did not come under the head of kidnapping (Note M). The age at which the conveying of a child out of the keeping of its guardian was termed kidnapping was put at twelve (cl 354). This would have curtailed that provision of Regulation 7 of 1819, which punished the enticement of a female minor upto the age of fifteen.

¹⁹⁰ Cf. Offg Regr, NANWP to Offg Secy to NWP Govt, 6 January 1840, Leg Progs, 2 December 1842, III, No. 104, p. 1427, NAI. *Ibid.*, No. 107, pp. 1514-20, NAI; Memorandum, 26 November 1838, Leg Progs, 2 December 1842, No. 54, part I, p. 582, NAI. W.H. Sleeman to Secy to Govt, 18 July 1840, Leg Progs, *ibid.*, No. 92, pp. 1043-5, NAI; D.F. McLeod, to Regr, NANWP, 18 January 1839, No. 105, p. 1433, *ibid.*

¹⁹¹ Cf. IPC s 497, s 498. However, the wife was not punishable as the abettor in charges of adultery.

¹⁹² The argument was that servants could easily be replaced, and that 'by making such petty breach of contracts offences, we should give not protection to good masters, but means of oppression to bad ones.' DPC Note P, p. 116.

regulation, was extended to the wider horizon of imperial commerce,¹⁹³ and to a labour market whose spatial dimensions were expanding.¹⁹⁴

Although colonial officials were hesitant about assuming the functions of moral regulation exercised by earlier rulers, public expectations and the need to find a normative frame for colonial law pushed them into an interventionist relationship in the household. In the course of the period covered here, the conceptual space of the household was narrowed in relation to the domains of the state and the market. Patriarchal violence was restructured through the various ramifications of the law relating to offences against the person. Under the pressure of anti-slavery sentiment and measures to regulate the traffic in human beings, there was an effort to place the realm of marriage and concubinage at a greater distance from the public world of commodity and the labour market.¹⁹⁵ This may have reinforced the legal standing of the husband's rights over his wife as a domestic and personal issue.¹⁹⁶

Some scholars have been exploring the history of the middle-class domestic sphere for elements of a sensibility not blighted by the 'homogenizing drives of bourgeois modernity'.¹⁹⁷ The realm of family offers a rich field for the study of affect in the construction of subjectivity. Yet it needs to be remembered that affect is subject to political and institutional construction,¹⁹⁸ it emerges

¹⁹³ DPC Ch. xxm, cl. 463, 464. and Note P; IPC s 493; IPC s 490, s 491.

¹⁹⁴ M. Anderson, 'Work construed', pp. 112-13.

¹⁹⁵ With the withdrawal of legal sanction for slavery, the idea of a life-long subordination was, in theory at least, removed from the relationship of employer and labourer. Of course the rights of the husband and the rights of the employer in some instances were both still enforceable by penal provisions. Yet there was a difference in the legal construction of subordination. Apprenticeship and indenture were time bound arrangements. In theory a relationship of debt-bondage could be revoked by the repayment of the loan. The marital tie now stood out from these other arrangements as one which gave the husband a life-long right in the services of his wife.

¹⁹⁶ In fact, colonial law may have sharpened the juridical identity of the individual male subject by positioning him as the potential head of a household, *vis-à-vis* certain familial and community controls over his behaviour.

¹⁹⁷ Dipesh Chakrabarty, 'Radical histories and question of enlightenment rationality', *EPW*, xxx, 14 (8 April 1995), pp. 751-68.

¹⁹⁸ The histories of the 'fragmentary and the episodic', examined as knowledge forms free of the structures of state and governmentality, seem to be

from the everyday material textures of time and labour put into the household by women, and from patterns of commerce which provide a new context for persons and objects within the home.¹⁹⁹ The domain of affect is particularly important for the terms on which female labour is mobilized.²⁰⁰ Institutionally, patriarchal power over women was provided with an anchorage in judicial narratives about emotional states which justified or mitigated the infliction of injury or death by men upon their female relatives. Ironically, the realm of emotion provided the basis here for a legal crystallization of masculine authority, rather than a point of resistance to colonial penetration.

assembled by nominalizing the other structures of power within which they are formed.

¹⁹⁹ Tanika Sarkar illustrates the way in which worries about indigenous industries circulated around the plea for feminine commitment to Hindu ritual objects. 'The Hindu wife and the Hindu nation', *Studies in history*, 8, 2, n.s. (1992), pp. 222, 225. In contrast to Chakrabarty, she has argued that Hindu nationalists tended to represent the family in purely emotional terms to oppose it to colonial public life as the domain of worldly strife.

²⁰⁰ Chakrabarty moves rather too rapidly to the position that the invocation of household duties in domestic manuals worked as 'a cryptic cultural code', 'a culturally shared way of referring to the qualities of grace/modesty and obedience . . .'. The material he cites gives a different sense of what women felt about the demands made on them for work, the experience of fatigue and contests around the idea of leisure. 'The difference-deferral of a colonial modernity', pp. 62-3. Rammohun Roy gave a more gritty picture of the domestic toil involved in the life of the upper-caste woman. He also referred to the influence which the husband was able to wield with the magistrate to recover a wife who had left him because of cruel usage. Cf. *A second conference between an advocate for, and an opponent of, the practice of burning widows alive*, 1820. The fact that domestic manuals constantly had to reassure women that household labour did not reduce them to the status of slaves or servants indicates a field of tension around the personhood of the educated woman.

Chapter Five

Criminal Communities: The Thuggee Act XXX of 1836

The preceding chapter examined those aspects of Macaulay's penal code which sought to refashion relationships of personal subordination to the principle of juridical contract. Its other proclaimed objective was to bring greater precision to the definition of offences. The law commissioners argued that variability and imprecision in the definition and classification of crimes made the system too dependent upon judicial discretion, and that this detracted from the authority of law and legislature.¹ Yet it is during Macaulay's tenure as Law member that an act had been passed which made it an offence to belong to any gang of Thugs without explaining what exactly a thug or the crime of thuggee was. The Thuggee Act XXX of 1836 ruled that

1. whoever shall be proved to have belonged, either before or after the passing of this Act, to any gang of Thugs, either within of without the Territories of the East India Company, shall be punished with imprisonment for life, with hard labour.
2. And . . . every person accused of the offence . . . may be tried by any court, which would have been competent to try him, if his offence had been committed within the Zillah where that Court sits, any thing to the contrary, in any Regulation contained notwithstanding.
3. And . . . no Court shall, on a trial of any person accused of the offence . . . require any Futwa from any Law Officer.

The act had many novel features: it applied with retrospective effect and it extended the jurisdiction of the Company's courts for this offence to territories outside the dominion of the Company.

¹ 'The power of construing the law . . . amounts to the power of making the law.' Indian law commissioners to GG in C, 14 October 1837, *PP*, 1837-38, vol. 41, pp. 466-8, 470.

The offence could also be tried in any court of the Company irrespective of where it had been committed, and without reference to the forms of Islamic law.² That a cant term like 'thug' was acceptable, and could legitimize such legal innovations is an indication of the success of a publicist campaign in official circles. Except for a few pettifogging judges everyone knew what thuggee was.³

The conception of communities socialized into criminality, with its members plundering or robbing as a 'profession', did not suddenly emerge in the 1830s.⁴ The theme has a history coterminous with the very inauguration of the Company's judicial initiatives.⁵ On the one hand Warren Hastings had stressed the need for uniform procedure; on the other he formulated Article 35 of 1772, which extended punishment for dacoity from the individual offender to his family and village.⁶ Hastings had also argued that conviction under Article 35 should be allowed on the grounds of public notoriety for dacoity. Professional crime had to be punished by different standards of evidence from those applied to offenders charged for a single crime.⁷

The theme of criminal communities was also used to justify

² The judicial weight of the fatwa on the final sentence had been drastically curtailed by the early nineteenth century but it was still regarded as an essential procedure of the criminal trial.

³ In Anglo-Indian parlance, thugs were believed to constitute a hereditary criminal fraternity, organized around beliefs and rites which upheld a profession of inveigling and strangling travellers. In contrast to dacoits, thugs were believed to murder by stealth rather than by armed attack. However the defining line between dacoity, thuggee and highway robbery was never very clear.

⁴ Cf. Jonathan Duncan, RB to GG in C, 27 February 1792, BRJ P/127/78, 13 April 1792, pp. 526, 535. E. Moor reported that in India robbery was, like begging, a hereditary craft, and not one viewed with great moral turpitude, *Hindu infanticide*, 1811, pp. 153-4; R. Jenkins, *Report on Nagpoor*, 1827, p. 294; J. Shakespear, Acting SP, WP, 'Observations Regarding Badheks and Th'egs', 30 April 1816, *Asiatick researches*, xiii, 1820; J. Malcolm, *Memoir*, ii, 1823, pp. 182-8.

⁵ Cf. chapter one.

⁶ The argument was that the dacoits of India were 'robbers by profession, and even by birth; they are formed into regular communities . . .'. Committee of Circuit to Council at Fort William, 15 August 1772. *Elementary analysis*, i, pp. 300-1.

⁷ WH to Council, 10 July 1773, and extract from progs of the Governor and Council, 19 April 1774, J.E. Colebrooke, *Supplement*, pp. 114-19, 122.

special executive powers or punitive drives of various sorts. The targets of such measures were supposed to have placed themselves outside the pale of society, thereby forfeiting their claim to the protection of regular procedure. In very general terms, such drives can be attributed to the wider process of colonial pacification, to the effort to make the subjects of empire both taxable and 'police-able'. However, one also has to take account of the constant reordering of the hierarchy of objectives within colonial law and order. The form of action, military pacification or judicial prosecution, police surveillance or reclamation, imposed its own constraints for the institutions of colonial order were not infinitely flexible. In addition, such drives may seem to be imposed by state on society, but the interplay between colonial order and social hierarchy could shape the initiative differently at different social levels, and points of resistance could force a reassessment of strategy.

The Thuggee Act, for instance, indicates a degree of conflict between institutional priorities. It was far easier to prosecute a prisoner on a charge of belonging to some ill-defined criminal collectivity than to establish individual responsibility for a specific criminal offence. But how far was this dualism between the professional/hereditary criminal and the casual offender to be pushed? At what point would the formal consistency of rule of law, and the principle of judicial control over executive action be jeopardized? Arguments for special powers against thugs or 'professional dacoits' had been countered by these hesitations. So what combination of circumstances shaped this manifestation of Providence, the mission to extirpate thuggee in India?⁸

⁸ Sandria Freitag argues that arrangements for dealing with collective crime grew up as a covert legal structure forming an alternative to the overt legal structure 'ostensibly geared to individuals' which provided the reassuring appearance of rule of law. 'Crime in the Social Order of Colonial North India', *MAS*, 25 (2), 1991, pp. 227-31. In contrast, I argue that both these elements existed in uneasy relationship within the same body of law, and their co-existence explains certain contradictions within it. Even if extra-ordinary measures to deal with criminal communities took shape in territory outside the Company's regulations, or within the field of executive discretion, they eventually had to be integrated to rule of law.

⁹ W.H. Sleeman, often referred to the circumstances facilitating the thuggee campaign as 'providential', *Ramasecama*, 1836, pp. 46-7. W.H. Sleeman, military officer, who joined the Political Service, and who, as Assistant to the Agent to the Governor General in the Sagar and Narbada territories (SNT),

The formulation of the Thuggee Act cannot be attributed only to complaints in judicial correspondence about the inadequacy of existing laws against professional or hereditary criminality. Magisterial and judicial action had been taken in British territory against people suspected of being thugs, or of belonging to a dacoit tribe, well before the acts of 1836 and 1843,¹⁰ but using legal provisions applicable to all offenders. Nor is it clear that special measures were required because the crime of thuggee had reached crisis proportions.¹¹ Official reports stress the discovery of the ramifications of thuggee rather than its escalation as the reason for sanctioning a campaign.¹² There was no clamour from their Indian subjects for measures against thuggee: the major complaint of officials was the difficulty of working through layers of collusion or concealment to assess the extent of this crime.¹³ Thugs did not attack parties which included Europeans, so it was not a crime which directly affected the safety of British travellers.

However, the establishment of a government monopoly in opium in Rajputana and Central India after the wars of 1817-18 and the flow of remittances from Bombay and Surat to finance this commodity, had increased the Company's stake in the safety of the traffic in this region.¹⁴ Government was also concerned to

successfully established a reputation for himself as architect of the thuggee operations (henceforth WHS).

¹⁰ Act XXIV of 1843 was 'for the conviction of professional dacoits, who belong to certain tribes, systematically carrying on their lawless pursuits in different parts of the country'

¹¹ The famines of 1833-4 in Bundelkhand, and subsequently in the Upper Doab, Delhi region and Rajputana in the later 1830s strengthened the belief that the flow of people on the road ought to be monitored for organized crime. However, the outlines of the campaign had taken clear shape before this conjuncture.

¹² In 1830 Sleeman, had warned of the increasing magnitude of thuggee, but so had Ochterlony, the British resident in Malwa and Rajputana, some eight years earlier. Cf. Sleeman's letter to the *Calcutta Literary Gazette*, 3 October 1830, in G. Bruce, *The stranglers*, 1968, pp. 81-3. D. Ochterlony to G. Swinton, Secy, Pol. Dept, 30 April 1822, in N.K. Sinha and A.K. Dasgupta (eds), *Selections from Ochterlony papers*, 1964, p. 244.

¹³ Cf. W.H. Sleeman, *Rambles and recollections*, 1844, revised, annotated edition, 1915, reprint, 1980, pp. 78-9, n. 4.

¹⁴ Till 1830 the Company maintained a monopoly over the sale of opium from this region. Thereafter it sustained its revenues by issuing passes for the transit of opium through Company territory. The operations against various species of plunderers in Central India and Rajputana intertwined with the

protect sipahis of the Bombay and Madras armies, moving through Central India on their way home to Hindustan. They represented, after all, a certain outlay in terms of training and political attachment.¹⁵ These factors had prompted British residents and political assistants in the princely states to intervene in the arrest and trial of suspected thugs in the years following the Pindari and the Maratha wars.¹⁶ Yet the Company had been reluctant to take over jurisdiction for this offence from the Indian princes and chiefs.¹⁷ Even within its own territories the Company's government had rejected various suggestions made by its officers for special powers or special laws against notorious thugs or members of dacoit tribes.

I suggest that in its initiation the thuggee campaign was woven into a political elaboration of paramountcy, expounded, not through military, fiscal or diplomatic arrangements, but through a rhetoric of authoritarian reform.¹⁸ The thuggee campaign appealed to all shades of reform opinion, both Evangelical and Utilitarian. Grafted as it was onto existing agencies — the administration of the non-regulation districts and the Company's political agencies in the princely states — it was not expected

policing of the opium line and the Company's efforts to increase its own revenues from trade and commerce at the expense of local chiefs. Government was also concerned about the safety of its treasure consignments, still vulnerable to sudden attacks in forest terrain from hunting bands such as *Badhaks* or *Karawals*.

¹⁵ F.C. Smith, AGG, SNT, to W.H. Macnaghten, 29 May 1832. Selected records of the Central Provinces Secretariat, 1829–32. Mss Eur D11, IOL, p. 132. Also, *The good old days of John Company*, 190', pp. 249–50.

¹⁶ Cf. Extract Bengal Political Consultations, 20 April 1824, no. 43, BC F/4/984, 1828–29.

¹⁷ Ochterlony, resident in Malwa and Rajputana, had recommended the same measures in 1822 which were implemented in the 1830s. He suggested that the paramount power set up courts to try robbers and murderers, 'ceasing to enquire to what state the Culprit is a Subject, or in whose dominion the Crime was committed'; but the Company would not commit itself. D. Ochterlony to Secy Pol. Dept, 30 April 1822 and Secy, Pol. Dept to Ochterlony, 24 May 1822, *Selections Ochterlony papers*, pp. 244, 249.

¹⁸ It was during Bentinck's governor-generalship, Lee-Warner remarks, that a new conception of political duties was developed 'which, derived from the law of nature or the requirements of civilisation, affected British relations with every Native state.' Sir William Lee-Warner, *The native states of India*, 1910, reprint, 1979, p. 100. See chapter six for a further elaboration of this theme.

to be a very expensive proposition either.¹⁹ The crime was approached with a different sense of mission now. Even before 1830, wrote Meadows Taylor, large gangs of thugs had been apprehended, especially in Bundelkhand and Malwa by Major Borthwick and Captains Wardlow and Henley, 'but without exciting more than a passing share of public attention. No blow was ever aimed at the *system* if indeed its complete and extensive organisation was suspected, or, if suspected, believed'.²⁰ This systematization imposed on the crime of thuggee mirrored the new role outlined for the paramount power. 'The thugs were 'Citizens of India and not of any particular division'.²¹ Only an all-India counter-system, in the form of the paramount power, could therefore root out this evil. 'So extensive and long standing a confederacy' needed general and comprehensive measures argued F.C. Smith, Agent to the Governor-General in the Sagar and Narbada territories. It was no longer enough to expel thugs from the Company's domains — such a policy of dispersion was of dubious value. Instead, the paramount power ought to assume responsibility for eradicating this 'scourge'.²²

The position of the Sagar and Narbada territory was particularly strategic for the launching of operations, surrounded as it was by a varying and decentred topography of Indian states.²³ These districts had been annexed from the Marathas in 1817–18 and were classed as a non-regulation area, administered by an

¹⁹ The Bentinck government, committed to retrenchment, would have discouraged the assumption of major administrative responsibilities in the princely states. Sleeman's proposal that the Company take over the administration of district Bhilsa from the Gwalior regime to protect travellers was rejected on the grounds of expense, and because the Gwalior darbar would object. G.W. Swinton, Chief Secy, to F.C. Smith, AGG, SNT, 4 August 1830, Mss. Eur D1188. H.H. Spry, medical officer at Sagar, recalled that booty recovered from thugs was enough to pay for all incidental charges of the department up to 1834 and for two new prison houses at Sagar. H.H. Spry, *Modern India*, 1837, pp. 162–3.

²⁰ Meadows Taylor, *Confessions of a Thug*, 1839, new edition, 1986, introduction, p. 5 (emphasis added).

²¹ F.C. Smith to W.H. Macnaghten, Secy, 26 June 1833, Home, T&D, Cons B.2, No. 4, p. 295, NAI.

²² F.C. Smith to Chief Secy to Govt, 20 June 1832, *CLWCB*, II, 1977, pp. 836–7.

²³ On the south lay Hyderabad and Berar, to the North and West, Bhopal, Gwalior, Bundelkhand and Baghelkhand.

Agent to the Governor General who was responsible only to the Supreme Government.²⁴ Legal procedure was kept very loose because of the recent acquisition of the area.²⁵ In 1836 F.J. Shore, criticizing the lack of supervision in the Sagar and Narbada territory, said this had made it 'a theatre for the experiments of incipient legislation'.²⁶

The other feature of the campaign was the way in which these officers of the Political Department expounded upon the unique knowledge they had acquired of thuggee so legitimate the special procedures adopted for its prosecution. Yet it was not in fact the cracking of some code which had put them in a position to hunt out thugs.²⁷ The main source for compiling lists of suspects and accumulating evidence for their conviction remained, as before, the testimony of accomplices who had turned approvers.²⁸ But the extensive recording of thug beliefs, slang, and superstition, seemed to authenticate the difference between the hereditary cult-oriented criminal and the casual offender; and this won the case for special procedures.

A certain institutional friction developed between the machinery of the Thuggee Department and the judicial and executive machinery of the regulation provinces. Sleeman and others presented this conflict as a problem of persuading the judicial establishment to believe in the reality of thuggee, but it was as much a problem of keeping executive discretion under judicial control. The effort to restructure forms of social existence which seemed antithetical to the creation of orderly productive tax-paying subjects, and to do

²⁴ The Agent was assisted by Political Officers drawn from both the civil and military services of the Company. The Politicals combined the duties of revenue collector, civil judge and magistrate, and had the same powers to arrest and try offenders as the magistrate. The Agent held biennial sessions in his judicial capacity as Commissioner.

²⁵ It was supposed to rest on the 'spirit' of the Bengal regulations but with a due regard for local usage.

²⁶ F.J. Shore, Offg Commr SNT, to Secy Sdar Board of Revenue, Allahabad, 7 May 1836, Home Misc., vol. 790, p. 422.

²⁷ Reeves, for instance accepts this mythicization of the campaign. 'Once his [i.e., Sleeman's] officers were armed with a systematic account of the signals it was possible to identify thugs and thug operations'. P.D. Reeves, introduction to *Sleeman in Oudh*, 1971, p. 12.

²⁸ That is, prisoners who confessed to their crime and agreed to give evidence against their accomplices in return for pardon or remission of sentence.

so through the regular mechanisms of civil authority, created new areas of executive discretion within the interstices of rule of law. At one level the thuggee and dacoity Acts were an effort to clothe crude devices for securing conviction with the semblance of due process. But they were also defended by arguments about the peculiar characteristics of Indian society or the backward state of Indian civilization. At the same time this discretionary authority had a certain disruptive potential for stable, bureaucratic procedures of law, so such initiatives were usually followed by a counter-pull, however weak, to define its boundaries.

The point of retreat from such drives is as significant a feature of the administrative shifts related to the policing of criminal communities as the point of inauguration. What explains the claim that the thuggee threat had been extirpated? Anything less than success is of course an embarrassment for a highly publicized campaign.²⁹ Yet when such campaigns proved disruptive of the general goals of law and order, for instance, by generating resistance on sensitive issues such as religious mendicancy, then a more flexible strategy might have to be formulated. A criminal community could be discovered in another incarnation with its particular 'profession' or 'clan' regrouped for another initiative in law and policing.³⁰

One reason why, from the late 1830s, Sleeman began to assert

²⁹ Governor General Auckland, suggested that Sleeman postpone the publication of his report on 'gang robbery by hereditary profession', till more progress had been made in putting it down. W.H. Sleeman, *Journey through the kingdom of Oudh in 1849-50*, 1, 1858, p. xxvi.

³⁰ As for instance, the Multanis of central India: they were described by Malcolm in 1823 as carriers and cattle-traders who, also engaged in some cultivation, and he placed them among the 'civil classes' of Muslims even though they were armed. In 1836, Sleeman described them as a class of 'ancient thugs', 'said to call themselves Naiks, and to travel and trade as Brinjaras', and in 1850, Captain G. Ramsay termed them 'a tribe of Dacoits' who up to the breaking out of war with the British were 'ostensibly traders in cattle'. J. Malcolm, *Memoir*, II, 1823, p. 113, WHS, *Ramaseeana*, p. 117, and G. Ramsay, Asst. Resident Nagpur, and General Superintendent (GS) for the Suppression of T&D, to Resident Nagpur, 31 August 1850, H.M. Elliot Papers, Mss Eur 314. Bagris or Bagurees, described by Malcolm as robbers under their own chiefs, and soldiers under native princes, were described by Sleeman in *Ramaseeana* (1836) as a 'class of thugs who reside chiefly about Soopar in the Gwalior territories' but in a later publication (1849) as a class of dacoits by hereditary profession. *Memoirs*, II, *Ramaseeana*, p. 75, *Report on Budhuk alias Bagree dacoits*, 1849.

that thuggee as an organized system had been extirpated may lie in an embarrassing realization of the fact that the charge of systematic murder and robbery of travellers could not be established against the various mendicant bands and peripatetic groups which had begun to be swept up by Thuggee Assistants. The apprehension that any long-term involvement with projects of reclaiming criminal communities would prove an onerous and expensive task may also have encouraged Sleeman to claim an end to the campaign.

The Civil and the Predatory

To examine the context for legal innovation I start by outlining British attempts to understand and categorize criminal communities, with the Company's drives towards paramountcy providing a crucial backdrop. The Sagar and Narbada territories, where the thuggee campaign took shape, bordered the terrain of an earlier initiative against a 'predatory system', in the form of the Pindari campaign of 1817-18.³¹ The Marquess of Hastings characterized the Pindaris as predators, even as robbers to reject any proposal that the Company's government should negotiate with them to avoid the expense of war.³² The invocation of the criminal metaphor continued in the instructions to military officers before the campaign: that since the Pindaris were public robbers, they were to be tried on capture and if found guilty they were to be summarily executed; but cultivators were to be left undisturbed.³³ 'In fine', wrote Lt Col. Fitzclarence, who was there at the inauguration of

³¹ The Pindaris, better described as a phenomenon than as a particular community, emerged in central India as bands of military auxiliaries, who served the various powers in that area, in particular Holkar and Sindhia, and began to acquire a territorial foothold on the Narbada. Those with a horse had been used by Indian princes to skirmish with the enemy's army and to pursue it into retreat. Among their numbers were also those who would forage for the army, carry grain to it, and dispose of their own booty and that of others in the aftermath of a successful campaign.

³² '... the atrocity of their character... forbade the degradation of negotiating with them...' Address by Marquess of Hastings to COD, 1823, in H. Bevan, *Thirty years in India*, vol. 1, 1839, pp. 187-8. Cf. Lt. Col. Fitzclarence, *Journal of a route across India*, 1819, p. 41, for his characterization of the Pindaris as 'enemies who were to be considered in the light of public robbers.' J. Malcolm also refused to accept that the Pindari resembled the Marathas at the point of their political emergence. *Memoir*, I, pp. 427-8.

³³ *Journal of a route*, p. 41.

the campaign, 'being viewed... as public robbers, their extirpation was aimed at and not their defeat as an enemy entitled to the rights of war.'³⁴ But the method used was entirely that of military attack until leaders surrendered or were killed, and followers melted away. On 25 November 1818 Hastings reported that their annihilation could be regarded as complete.³⁵ And yet the Pindaris, said to have been extirpated, had at times been rumoured to have swollen to huge numbers. Malcolm, who followed as an administrator in the wake of these campaigns in central India, gives details of many groups from the 'lower orders' who had joined the Pindaris.³⁶

At the time it was argued that a clear demonstration of overwhelming military supremacy, a ban on 'predatory warfare', and the fixing of state boundaries would force armed bands to dissolve into the peaceable sections of the population.³⁷ And yet those who had swelled the ranks of various mercenary bands in Central India could as well take to the roads to rob travellers.³⁸ If there was any unease about the social flux unleashed by colonial tranquillity, it was reflected in attempts to set out typologies distinguishing between peaceable and predatory sections of the population. Malcolm made such an effort in *A memoir of Central India*, 1823, but this categorization was not attended by a call for special laws or for special jurisdiction in the Indian states. He regarded political anarchy, not some immutable principles of social organization, as

³⁴ *Ibid.*, p. 41.

³⁵ Political letter to the court, 25 November 1818, para 23, in B.K. Sinha, *The Pindaris*, 1971, p. 174. Pindari leaders and their immediate followers were given grants of land to settle them in Bhopal and in Gorakhpur, *ibid.*, pp. 175-83.

³⁶ Many of the Pindaris, he wrote, were from the 'lowest of the labouring classes', almost all the Hindus being Ladul, 'a low class whose usual occupation is to bring grass and firewood to camps.' Malcolm also remarked that the dispersion of the Pindaris had increased the class of Muslim cultivators, artisans and labourers, for many Hindus of low caste who had joined them had become Muslims. *Memoir*, II, pp. 176-7. Sita Ram Sepoy said the Pindaris always had better information than the British forces, and that the people of Bundelkhand were on their side. James Lunt (ed.), *From sepoy to subedar*, 1875, 1988, pp. 38, 46.

³⁷ *Memoir*, I, p. 462. Cf. also, B.K. Sinha, *The Pindaris*, p. 176.

³⁸ In fact pacification created easier targets by multiplying smaller parties of travellers, less apprehensive about encountering armed bodies. Cf. J. Stewart, Resident Indore to G. Swinton, Chief Secy, 12 August 1829, 'The very pacification of Malwa has led to the extension of this murderous system to a degree unknown before.' *Ramaseena*, p. 378, also pp. 411-12.

the generator of 'predatory' communities, and paramountcy as the force of stabilization.³⁹ However, the interesting point about – Malcolm's typology is that the distinctions between the peaceful and the predatory constantly seem to dissolve. He then introduces a further qualification between those who had turned to plunder because of political anarchy and tribes brought into central India in a military capacity which had formed mercenary bands.⁴⁰ Malcolm also had to recognize that certain 'predatory' associations did not fit into any distinct social class or tribe. He placed the thugs in a category of 'associations of men of all tribes . . . whose object is to live upon the community'; but he did not advocate any special measures against them.⁴¹ The fluidity of the line between the civil and the predatory and between military service and robbery is evident at all levels of Malcolm's typology.

In Meadows Taylor's novel, *Confessions of a Thug*, the thug hero, Ameer Khan, takes service with a Pindari chief on the reasoning that, 'I was a soldier by inclination if not by profession, and I thought . . . we might make as good a thing on it as if we went out on expeditions on our own.'⁴² But, as pointed out earlier, the Pindaris and the thugs tended to be regarded as two distinct groups in official accounts.⁴³ I will now examine these overlaps more

³⁹ Malcolm begins the chapter on the population of central India with the statement that he would start with a brief view of the different tribes, and 'conclude by a classification that will distinguish those who follow peaceable occupations from the number who still consider arms their sole profession.' *Memoir*, II, p. 106. Elsewhere he uses the distinction 'civil classes' and 'the predatory and turbulent classes'. *Ibid.*, p. 224.

⁴⁰ *Ibid.*, pp. 173–4. The character of the zamindars and the patels (village head men), Malcolm wrote, had 'deteriorated'; as finding themselves too weak to resist violence, they had taken to criminal means of retaliation: 'Thieves were not only protected by them, but they encouraged the settlement . . . of men belonging to tribes to whom theft and robbery are occupations from father to son . . .'. With the restoration of tranquillity, wrote Malcolm, the first class would return to cultivation and the other sort would have no option but to take up peaceable pursuits, while 'foreign' mercenaries would be expelled. *Ibid.*

⁴¹ *Ibid.*, pp. 185–8.

⁴² *Confessions of a thug*, p. 336.

⁴³ *Ramaseena*, pp. 4–5. But Ochterlony had drawn a connection between the suppression of the Pindaris and the emergence of thuggee: 'His Lordship in Council will have seen that, out of the Pindari System has arisen another, not of open violence, but if possible, more sanguinary, as it seems to be almost universal practice to insure the concealment of the act of Robbery, by perpetrating the Crime of Murder.' D. Ochterlony to G. Swinton, Secy, Pol.

closely, to suggest a perspective on the thuggee phenomenon. There was a way of life in which a particular form of predation could form a part, sometimes a regular part, of a range of subsistence options, but it was not the criminality by birth and profession projected by the Company's police and legal drives.

Criminal Communities and 'Way of Life' Criminality

I begin with a tentative search within the narratives of those arrested for thuggee, or for belonging to a dacoit tribe in the 1830s and 1840s for points of distinction between the prisoners' own interpretation of their activities and that imposed by the concerns of British examining officers. The records of the Thuggee Department are promising for their sheer density. The prisoners' narratives were not just determined by the department's need to accumulate evidence and to sustain a case for special police and legal measures; the examining officers also saw themselves as recording British mastery over an Indian underworld, now sorted out into various communities with their rules, language, and social practices.⁴⁴

The approvers who provided much of this information had to convince the officers of their usefulness by vaunting the range of their expeditions and attacks. But the reliance which the Thuggee Department had to place on the evidence of approvers also gave the latter a certain bargaining power. The certificate given to the approver stated that he would 'serve Government and be treated well; and have all (reasonable?) indulgence . . .'.⁴⁵ Band leaders of especial notoriety sometimes entrenched themselves as the favourites of a particular officer who would call upon them to regale

Dept. 30 April 1822, in *Selections from Ochterlony papers*, p. 243. Cf. also Bentinck's 'Minute on the affairs of Rajputana and Delhi' referring to bodies of plunderers, the 'remnants of the Maratha Pindari evil' who had lost their occupation as a 'legitimate trade' and now had to be put down. *CLWCB*, II, p. 787.

⁴⁴ Yet thuggee with its suggestion of conspiratorial agency could evoke more uneasy visions of India as well. Discussing the symptoms of derangement among Europeans J. Macpherson, M.D., said, 'Insane patients very generally dislike natives and, when they suspect conspiracies, notions of Thugs, & c. are very common.' J. Macpherson, M.D., 'Report on insanity among Europeans in Bengal', *The Indian Annals of Medical Science*, April 1854, pp. 704–5.

⁴⁵ WHS to W.G. Bird, 5 April 1839, Home Dept, T&D, Cons G8, July 1838–August 1839, NAI.

European visitors with accounts and demonstrations of their craft.⁴⁶ One could argue therefore that approvers did have a limited licence for self-expression; their responses to the examining officers certainly display points of dispute and evasion. For instance, when Sleeman sought to impress the fact of 'mastery' on some thug prisoners, arguing that the *iqbal* (good fortune or grace) of the Company had prevailed over that of their female deity, he received ambivalent responses. One prisoner argued that in Calcutta even the Company offered worship to the Goddess Kali.⁴⁷ And again, the prisoners would agree that thuggee was their 'business' but they would insist that this business be recorded in certain descriptive terms and not in others — as an activity linked with skill, honour and adventure, not as theft. Reynolds, who took down the depositions in Hyderabad, reported that 'the denomination of thief is one that is particularly obnoxious to them, and they never refrain from soliciting the erasure of the term, and the substitution of that of Thag whenever it may appear in a paper regarding them'.⁴⁸ Perhaps the term 'thief' was rejected because it suggested they might prey on their neighbours' property, or steal goods entrusted to them, attributes of low social status within their own community.⁴⁹ Prisoners arrested for thuggee made a distinction between the norms they would observe within their

⁴⁶ Cf. Fanny Eden's acidic comments on Captain Paton, who was a 'great Thug fancier . . . and makes positive pets of some' and on Europeans who having had much to do with their examinations view them 'in a most romantic light'. J. Dunbar (ed.), *Tigers, durbars and kings*, 1988, pp. 104, 120. Also, Emily Eden, *Up the country*, 1983, pp. 59–60.

⁴⁷ *Ramaseema*, pp. 76–7. Cf. also the qualified responses of approvers Nasir and Sahib Khan when Sleeman quizzed them on the suppression of thuggee in the Deccan; in F. Tucker, *The yellow scarf*, 1961, Appendix 2, pp. 192–3. In general the prisoners tended to blame their own actions, their non-observance of the rules which brought access to supernatural power, rather than the defeat of the source of power itself.

⁴⁸ Lt. Reynolds, 'Notes on the Thags', *JRAS*, iv, 1836, pp. 200–13.

⁴⁹ Cf. J. Paton papers, BM Addl Mss 41300, pp. 2–5. However, among humbler orders of society, one does come across admissions about certain forms of theft as interwoven with their livelihood. But here again distinctions were made between the kind of crime they would or wouldn't commit. A Dosadh, a low-caste labourer, interrogated for robbing a British lieutenant, declared, 'I was not a Camp thief that I should rob the *Pultun* (regiment) but only thieved for my own livelihood.' Declaration of Bholah Dosadh, village Pondahpoor, pargana Ballia, 4 March 1788, BRC P/5 /25, 3 October 1788, p. 735.

own village and those which determined their search for legitimate prey.⁵⁰

How does one deal with the admission of many of those swept up for dacoity or thuggee that robbery was indeed their profession and their identification of other groups on similar terms?⁵¹ Can these statements just be dismissed as the product of colonial stereotyping, or as structured solely by the process of prosecution? Different skills, means and patronage would mediate access to different sorts of crime. In certain contexts the element of 'predation' could become more marked as other sources of livelihood contracted. The booming military market of eighteenth century India encouraged a regular outflow of mercenary bands, especially from Hindustan into the Deccan and Central India in search of service. Highway robbery was probably always an option for such bands as they moved between one employer and another or to and fro from home. In 1812–13 Thomas Perry, the magistrate of Etawah made enquiries about a group of mercenaries brought into the district by the Marathas, and subsequently sheltered by zamindars, who loaned them money to be repaid from expeditions into the Deccan.⁵² Amaun, the brother of one such patron, Chaudhary Lalljee, chief zamindar of village Sindaus, was asked: 'Whom do they call Thugs?' His response: 'They are generally denominated Sepahees. They travel on towards the Dekhun, many people say that they plunder, rob and murder.' However, other inhabitants of Etawah also termed themselves sipahis and made the occasional foray into the Deccan. This was the case with one Bukht, of the Lodeh caste, whose brother Doorjun was

⁵⁰ Nasir, thug approver, said that those who had committed an ordinary murder would be haunted, but not if the murder was committed during a thug expedition because this was sanctioned by the Devi. *Ramaseema*, pp. 175–6.

⁵¹ Of a gang seized in Kotah, Ochterlony had reported that 'tho' very few acknowledge the Commission of any particular Robbery — Yet of the whole number there are I think four who deny their being Thieves by Profession and associated for the purposes of Robbery.' D. Ochterlony to Secy, Pol. Dept., 30 April 1822, *Selections. Ochterlony papers*, p. 244. Cf. also deposition of Dhokul Singh, 7 May 1839, arrested as a dacoit of the Baurie tribe: 'The Kunjurs are all thieves, they cut grass and make choppers . . . but always thieve. . . . The Nutts dance, beat drum, and amuse people with their tricks, but they are at the same time, all thieves. Those who go about with snakes, are all thieves . . .'. *Report on Budhak dacoits*, p. 323, also pp. 31, 33, 256.

⁵² T. Perry papers, Add 5380, Cambridge University Library, pp. 38–70.

a humble ploughman.⁵³ The same Doorjur was also questioned about one Ghuseeta: 'Used the world to call Ghuseeta a Seepahee also?' 'Yes a Seepahee and Thug — he was a jemadar of Thugs.'⁵⁴ The victories of the Company brought about a contraction in this market for mercenary employment which probably made this flow between service and banditry more one way and permanent.

Mercenaries who regularly set out after the rains would have a knowledge of the major routes and the confidence to plan and co-ordinate the inveigling and killing of large parties of travellers. Other sources of livelihood gave access to forms of crime not requiring that degree of organization. 'Real' crime, writes Douglas Hay, 'is shorthand for a large part of the life of the poor.'⁵⁵ A pastoralist is in a particularly favourable position to steal cattle and to dispose of them, but putting poison into the food of a traveller to stupefy and rot him can be done by almost anyone. In all cases it would be a mistake to exaggerate the degree of specialization involved.⁵⁶

Interspersed with the prisoners' statements that robbery was their 'business' are others which indicate that this element was interwoven with other patterns of subsistence.⁵⁷ The picture which emerges from these accounts is one of a striking diversity of occupation among those arrested as thugs or dacoit bands, though many of these had regular links with agricultural communities.⁵⁸

⁵³ Examination of Doorjur Lodeh, resident of Sindause, 1 January 1813, *ibid.*, p. 70.

⁵⁴ *Ibid.* There are many references in the 1830s to thugs being searched out from the regiments of Indian rulers. F.C. Smith, AGG, SNT to Swinton, Chief Secy, 26 May 1832, No. 1158. Mss Eur D1183, pp. 129–31. Meadows Taylor, *The story of my life*, 1882, p. 80. D.F. McLeod to F.C. Smith, 10 October 1834, and W.H. Sleeman to Captain Graham, 8 February 1839, about thugs from Sindaus in the Gwalior brigade. Foreign Pol. Cons, 11 May 1835, No. 78, NAI and Home, T&D, Cons. G, July 1838–April 1839, Letter No. 2505, NAI.

⁵⁵ Douglas Hay, 'War, dearth and theft in the eighteenth century', *Past and present*, 95 (May 1982), pp. 117–60.

⁵⁶ Cf. A.L. Beier, *Masterless men*, 1985, for a fascinating exploration of the strategies and resources open to those who took to the road in sixteenth and seventeenth century England, either as a permanent way of life, or on the thin line between migration and vagrancy.

⁵⁷ Cf. deposition of Dhokul Singh, cited in fn. 52 above.

⁵⁸ S. Nigam stresses the peasant origins of thugs and Badhaks, which he says, were ignored by official discourse. 'Disciplining and policing the "criminals by birth"', part 2: The development of a disciplinary system, 1871–1900',

Members of the bands whom Sleeman classified as 'Budhak alias Bagree decoits' sometimes described themselves as spending eight to ten months in the year hunting.⁵⁹ Such bands of hunters and fowlers sought the patronage of princes whether in their *shikar* expeditions or as auxiliary contingents in their armies; but they could also organize independent raids. In the official presentation of criminality by profession these other components are ignored or regarded as mere disguise: Thugs took up cultivation or service with Indian chiefs as a 'screen' for their activities, Badhaks set out for a dacoity in the 'guise' of bird-catchers.⁶⁰

In the official interpretation of professional/hereditary criminality the elements of dissonance and displacement in the prisoners' accounts, between their status and activity under a former political order and that in the present, or the change wrought by famine or other calamity, were usually ignored. But there is a definite element of band lore too in these depositions, which buttressed the official presentation of criminal cultures. This lore is organized around the search for sources of legitimacy for their *chakri*, their livelihood, which they linked variously to the sanction of antiquity, family tradition, divine power and political charisma.⁶¹ The existence of band lore, a common slang, and a shared knowledge of major attacks,

IESHR, xxvii, 3 (July–September 1990), pp. 274–5. I stress instead the diversity of occupation among those characterized as thugs and dacoits. Of these the various peripatetic communities began to be directed into the ranks of agricultural labour, or later into the ranks of quarry, factory and mine labour. Meena Radhakrishna, 'The Criminal Tribes Act in the Madras Presidency', *IESHR*, xxvi, 3 (July–September 1989), pp. 269–95.

⁵⁹ *Report on Budhak decoits*, 1849, p. 130. The Rajah of Kottar is described as keeping bands of Badhaks to supply his table with game, *ibid.*, p. 54. Badhak was one of the denominations for bands on the margin of forests, who engaged in hunting, trapping and fowling. They also provided irregular levies for the army of the Nawab of Awadh or swelled the retinues of powerful zamindars. Their skill with bow and spear and their tradition of association with military raiding allowed some of them to organize lightning raids on consignments of treasure, often at a great distance from their own residence. Cf. RB to GG in C, 22 May 1791, BRJ, P/127/74, 15 July 1791, p. 603 for an early reference. *Shikar*: hunting.

⁶⁰ *Report on Budhak decoits*, p. 17.

⁶¹ Baz Khan, tried in Jabalpur in 1826 is reported to have stated 'almost vauntingly that his forefathers for seven preceding generations have been Thugs of the *Badshabee Duftur*, or enrolled as thugs in the Royal records at Dehly'. Administration of justice in the SNT, Bengal Judl letter, 12 July 1827, BC F/4/1159, p. 48. *Chakri*, *naukari-chakri*: service, employment.

does suggest long terms of association, as does the ability to coordinate action in large gangs. But equally significant is the ease with which identities constituted around a particular form of *naukri-chakri*, could shift among men who sought service. This is strikingly illustrated in the thug prisoner Imamee's description of one 'Hormat Khan alias Mungulea, formerly caste Gururea and a thug by trade but now a Mussalman and a Sipahi in a Regiment at Malegaon . . .'.⁶² Malcolm had observed that many Hindus who had joined the Pindaris became Muslims.⁶³ Campbell noted the connection between service to the court of Lahore and 'being a Sikh'.⁶⁴

This band lore was constituted around the 'profession'; but it did not necessarily establish a strong fraternal link with other members or dominate all other social affiliations. As Stewart Gordon points out in a very perceptive article on thuggee, there was no system of reprisals against those who betrayed the 'fraternity' by turning approver.⁶⁵ Sleeman registered the presence of certain caste and religious animosities between the approvers.⁶⁶ They would generally show a concern only to shield members of their own family or caste. In fact some of the approvers seemed to regard their assistance to thug-hunting detachments as having put them in service to the Company, and Sleeman encouraged this sentiment.⁶⁷ The approver Bukhtawar said they were not apprehensive about informing on former accomplices because they had become servants of Government.⁶⁸ Ram Bux, recounting his services to Government in catching thugs exclaimed, 'they are all my enemies now!'.⁶⁹

⁶² Deposition of Imamee, 19 August 1831, forwarded by WHS to Resident, Nagpur, 17 October 1830, in *Selections from the Nagpur residency records*, vol. IV, 1818-46, Nagpur, 1954, p. 274.

⁶³ *Memoir*, II, p. 177.

⁶⁴ G. Campbell, *Memoirs of my Indian career*, I, 1893, p. 66.

⁶⁵ S.N. Gordon, 'Scarf and sword', *IESHR*, VI, 4 (December 1969), pp. 403-29.

⁶⁶ Cf. Sleeman to F.C. Smith, 11 March 1831, in G. Bruce, *The stranglers*.

⁶⁷ '(We) require to raise them a little in their own esteem, and make them feel a little exalted as the servants of the state. . . . The terms *Sarkar ka Naukar* and a decent appearance have a wonderful effect in making them exert themselves.' WHS to Resident, Hyderabad, 16 July 1832, Home, T&D, Cons G.1, June 1832-May 1833, pp. 66-7, NAI.

⁶⁸ *Ramaseeana*, p. 186.

⁶⁹ J. Paton papers, BM Addl Mss 41300, p. 9. Some approvers suggested that they could help the police to detect other 'classes' of thieves as well. *Ibid.*, pp. 19, 29.

The approvers swept up in the 1830s and 1840s cite the antiquity or long tradition of their 'business' as one among the other factors which established its legitimacy. However their accounts of actual attacks do not go further back than the early nineteenth century.⁷⁰ Even the thug genealogies which Sleeman constructed do not seem to stretch further back than three generations and include the names of adopted children.⁷¹ Official histories of thuggee referred to the immediate political background but also sought to push its origins into the remote past, gleaned chronological points from stray references to predatory gangs in Persian chronicles or in accounts of European travellers to Mughal India.⁷² The stress placed by officers on strangling as the distinguishing mark of this 'ancient fraternity' also disassociated the method of murder from issues of convenience and context and gave it cult status. 'The Thugs adopt no other method of killing but strangling', declared Lt. Reynolds.⁷³ But the prisoners' narratives show that the strategies of gang robbery had been somewhat different in the early nineteenth century, especially in the Indian states. Travellers had associated in large crowds for safety, and bands of armed men in search of service were a common sight. Men who associated to rob travellers could travel with arms and in large numbers without

⁷⁰ The men seized by Reynolds in the Nizam's territory in the early 1830s confessed to having made annual expeditions over the previous 25-30 years. Reynolds, 'Notes on the Thags', p. 213. Cf. also deposition of Rambux, thug approver, 15 April 1837, Paton papers, BM Addl Mss 41300, p. 8; and *Ramaseeana*, Appendix I, pp. 101-10.

⁷¹ *Ramaseeana*, Appendix A.

⁷² Cf. Sleeman's citation of Thievenot's *Travels* (1687) for a reference to robbers who used a noose. *Ramaseeana*, p. 11. Also V.A. Smith's editorial note in *Rambles and recollections* citing the history of Firoz Shah Tughlaq (1351-88). The following example illustrates the historicization of lore. Feringea, an approver, had claimed that all the operations of their trade were to be seen in the sculptures at Ellora. This claim was abstracted from his other assertions — that these caves were the work of some unknown supernatural agents, and that everyone's trade, however secret was described there — and given the status of a historical fact by W. Crooke who thereby traced thuggee into early Hindu history. Cf. Tuker, *The yellow scarf*, Appendix 2, pp. 197-8 for Feringea's account, and *ibid.*, p. 63, for Crooke's rendition in *Things Indian*.

⁷³ Reynolds 'Note on the Thags', p. 201. Sleeman traced the historical roots of thuggee through this feature. The Thugs, he writes, were the descendants of the Sagartii, a pastoral group of Persian descent who put their enemies to death by throwing a leather noose over them. *Ramaseeana*, pp. 4, 11.

arousing suspicion. They could use a greater measure of open violence and take fewer precautions over the disposal of bodies.⁷⁴

At a continuous but diffuse level the official attitude towards the culture of men on the road — mendicants, peripatetic professions, bands who frequented forest zones or the fringes of cultivation — had always been one of unease. Such groups seemed to elude the reach of taxation and policing; their way of life was considered motley and suspect.⁷⁵ Even an ethnographic interest in certain wandering tribes of India, who were believed to resemble the gypsies of Europe, was tinged with a suspicion of criminality or immorality in their lifestyle.⁷⁶ The religious mendicant was always an object of official suspicion, but police measures were reined in because of the veneration in which they were held.⁷⁷

⁷⁴ Cf. deposition of Dorga, describing an assembly of 200 thugs at a village in Nagpur around 1809–10 who had murdered a party of 40, *Ramaseeana*, Appendix H, p. 101; a band of 350 thugs killed a party of 60 sent to recruit soldiers from Hindustan in 1813, *ibid.*, Appendix I, p. 110. In 1810 the magistrate of Chittoor reported that before annexation the phansigars sheltered by the *poligars* had set out in large gangs, but now gangs were smaller and their plans less systematic. Thornton, *Illustrations*, 1837, p. 272. In a drive conducted between 1810–14 against suspected thugs in the Doab districts conquered from the Marathas, the magistrate of Etawah described them as making their attacks 'more like bandittis, openly in large bodies . . . not taking any care to conceal the crime by hiding the bodies . . .'. Magt Etawah to Actg SP, WP, 7 August 1815, and G. Stockwell, Joint Magt Etawah to T. Perry, Magt Zillah Etawah (nd.) in *Illustrations*, pp. 321–7.

⁷⁵ Cf. Commr Kumaon to SP, Delhi, 23 September 1823 for a reference to 'motley assemblies' of people in the foothills, 'persons of the lower classes engaged in the cutting and transporting of timber and other Jungle products, together with Brinjaras, Herdsmen, shikaris, and ca.' Since the conquest of Kumaon, he reported, these areas were becoming more orderly. COK, Pre-Mutiny, Judl letters issued, 1822–25, Basta 23, UPSA. Cf. also Sleeman to W.H. Macnaghten, 10 September 1836, on classes 'known' to practice thuggee though none had as yet been convicted; those who roamed with bears and monkeys, *daturias* (poisoners), Bairagis, mendicants, and Multanis, a class of transporters. Home, T&D, Cons G.4, September 1836–March 1838, pp. 23–5, NAI.

⁷⁶ J.A.R. Stevenson of the Madras Civil Service combined his account of the P'fansigars, with one of the Shudgarshids a 'tribe of jugglers and fortune tellers' described as 'notorious for kidnapping children' and for an 'abominable traffic' in the sale of sirews as charms against evil. 'Some Account of the P'fansigars, or Gangrobbers and of the Shudgarshids, or Tribe of Jugglers.' *JRAS*, 1, 1836, 280–4.

⁷⁷ Cf. Judge-Magt Jaunpur, 15 August 1815, for a complaint about religious vagrants exacting tribute, fakirs giving poison to pilgrims to rob them. Home

Though Sleeman usually avoided any essentialist descriptions of Indian society, he too shared a suspicion of mendicant bands. He considered the 'monastic orders' analogous with the Pindaris, Thugs and Dacoits, in being composed 'of persons floating loosely upon society, without property or character, with the object of acquiring the property of others. . . .'⁷⁸ He mistrusted the various peripatetic professions, such as the bullock-transported pack trade in raw produce which he regarded as a source of great insecurity to life and property.⁷⁹ Such bands seemed particularly inaccessible to the control of the state. The thuggee campaign reinforced this latent suspicion about these wandering professions. In his vocabulary of thug 'language', *Ramaseeana*, Sleeman listed various peripatetic communities as thug-tribes.⁸⁰

There were various patterns, not necessarily those of displacement, which contributed to the phenomenon of men on the road. Seasonal movements of labour, famine migration and pilgrimage tended to flow into each other. There were communities which provided various goods and services to settled communities — grain transporters,⁸¹ cattle dealers, medicine men, basket weavers, entertainers, and petty pedlars. There were others who subsisted in a forest ecology on the margin of cultivated areas — hunters, woodcutters, pastoralists.⁸²

Misc 775, pp. 620, 628. Shore's suggestions for a 'punitive discipline' of arrest and hard labour for all such 'idle scamps', and the registration and surveillance of stationary fakirs was typical of the official attitude. F.J. Shore, *Notes*, II, 1837, pp. 411–12. In the 1820s and 1830s missionaries attacked the government for countenancing idolatry by collecting pilgrim tax, a theme which mingled with utilitarian arguments against the loss of productive labour and life which pilgrimage was supposed to entail. J. Statham, *Indian recollections*, 1832, pp. 138, 144, 159. J. Peggs, *Pilgrim tax in India*, second edition, 1830, p. 47.

⁷⁸ *Report on Budbuk dacoits*, 1849, p. 268. However he also acknowledged that religious mendicancy had been the 'great safety valve through which the unquiet transition spirit has found vent under our strong and settled government.' *Rambles and recollections*, I, p. 446.

⁷⁹ *Ibid.*, p. 83. Cf. also Chapter Four.

⁸⁰ Cf. *Ramaseeana*, pp. 85, 126, 144 for references to Multani, Lodaha and Qulundera thugs.

⁸¹ Capt. J. Briggs, 'Account of the origin, history and manners of the race of men called Bunjaras.' *Bombay transactions*, 1 (1819), pp. 159–83. R.G. Varady, 'North India Banjaras', *South Asia*, new series, II, 1 and 2 (March–September 1979), pp. 1–18.

⁸² Cf. E. Balfour, 'On the Migratory Tribes of Natives in Central India',

Yet the contribution of paramouncy to the phenomenon of men on the road was scarcely acknowledged in official accounts. The idea that certain patterns of crime on the high road were related to declining opportunities of service with chiefs or rulers is suggested only in Sherwood's 1816 report.⁸³ Sleem in blamed vagrancy and highway robbery on the fact that Indian rulers disbanded their militias all at once, or discharged the disabled or those with an injured horse without making any provision for them. However, he did not examine the pattern of permanent disbandment itself.⁸⁴ The discontent of the dismissed Muslim cavalryman was given some recognition,⁸⁵ but there was little acknowledgement of the loss of employment, periodic or regular, which a polity of competing states and dispersed focuses of authority had given to men of humbler rank: those who joined the infantry, swelled the ranks of army auxiliaries, or foraged, brought supplies and cut grass for draught cattle and horses. Instead, the desire to feel in control of this floating population encouraged the putting together of official typologies of criminal cults and criminal tribes.

The other issue in evaluating the 'reality' of criminal communities, whether that of thug gang or dacoit tribe, is of how distinct as a social group they were in the indigenous perception. The beliefs and rituals assembled around a plundering raid were familiar to Indian society in other contexts — so it was not this lore which marked these bands out as startlingly different in Indian eyes.⁸⁶ The method was what distinguished various sorts of crime

JRAS, 13, 1 (1844), pp. 29–47 for a sampling. C.A. Bayly draws attention to the very significant space which tribal and nomadic people occupied on the social map of eighteenth century India and the importance of their interaction with the arable economy and its more hierarchical landed society. *Indian society and the making of the British Empire*, 1988, pp. 29–31.

⁸³ '... it may be conjectured that many persons, deprived by the declension of the Mohammedan power of their wonted resources, were tempted to recourse to criminal courses to get their subsistence'. Sherwood, 'Observations regarding Badheks and Th'egs', p. 271.

⁸⁴ *Rambles and recollections*, pp. 443–6.

⁸⁵ There was a continuous debate about what was to be done with the irregular cavalry as the armies of the Indian rulers began to be reorganized under the subsidiary system. Cf. Lt. Col. Fitzclarence, *Journal of a route*, p. 266 and Malleson, *Memoirs*, p. 107, for the decline in opportunity for respectable military service for Indians in the wake of British victories.

⁸⁶ The remaining officers of the Thuggee and Dacoity Department were in fact becoming acquainted with popular religion and culture but refracted

in the indigenous perception, whether *thagi*, inveigling and deceiving, or *phansigiri*, strangling.⁸⁷ In a seventeenth century autobiography of a Jain businessman, the *Arḍha-Kathanak*, when two travellers are charged with being thugs it is because they were suspecting of putting counterfeit coins into circulation, not because they belonged to a murderous band.⁸⁸ The word *phansigaṛ*, is certainly used in indigenous accounts to refer to a person who regularly strangled and robbed travellers,⁸⁹ but not to suggest affiliation to a peculiar sect. It is for this reason that official accounts could be very uncertain about whether Indians knew about thuggee or whether the system was veiled to them too.⁹⁰ The case for special measures had rested on the argument that such communities stood outside the pale of society. The Pindaris were the 'dregs' of society, the thugs originated from parties of 'vagrant' Muslims, the Badhaks were outcaste Hindus and Muslims.⁹¹ The taint of immorality and debauchery was sometimes

through the prism of criminality. A characteristic example was the assertion that the Bhawani temple at Mirzapur, a popular site of pilgrimage, was filled with thugs and subsidized by their offerings. W.H. Sleeman's letter to the *Calcutta Literary Gazette*, 30 October 1837, in G. Bruce, *The stranglers*, pp. 81–2, and Lt. Reynolds, 'Note on Th'ags', p. 202.

⁸⁷ Stewart Gordon points out that thugs did not enter the local folklore of bandits and robbers. 'Sword and Scarf', 408–9. Shakespear reported that the word thug was used in the Western provinces, to describe those who robbed and murdered in the highways but that the literal meaning was villain, rascal, or knave, 'Observations', *Asiatic researches*, 1820, pp. 287–8.

⁸⁸ Cf. R.C. Sharma, 'Aspects of public administration in Northern India in the first half of the seventeenth century', *Journal of Indian history*, LIV, part 1 (April 1976), pp. 107–15.

⁸⁹ Cf. Aurangzeb's farman of 1672, ordering punishment for a strangler who was 'habituated to this misdeed ... or is notorious among people for this misdeed and the Nazim of the Subah knows about it or vestiges of strangulation and property of people are found with him ...' *Mirat*, p. 249.

⁹⁰ Meadows Taylor, for instance, asserts that the system of thuggee was unsuspected by the people of India, but a couple of pages later says that landholders and village chiefs had had connections with thugs for generations. Introduction to *Confessions of a thug*, pp. 1, 3.

⁹¹ J. Paton to Caulfield, Actg Resident, 25 January 1840, Foreign Pol., A, 9 March 1840, No. 122, NAI. Criteria such as dietary habits and a wandering way of life were invoked to lump together diverse groups, but such arbitrary categories could create problems of consistency. For instance: 'The Badheks of Aligarh and the Shigal Khors of Gorakhpur are outcasts of Muslims and Hindus — however the majority are Rajputs.' J. Shakespear, 'Observations', 1816, pp. 282–3.

introduced to accentuate this marginality.⁹² Yet again, it was often stated that the thugs could be model family men or respected members of their village. If known thugs were accepted within society, then the justification for special measures was difficult to maintain. Officials who wanted a swifter pace of institutional change, or Evangelicals who stressed the need for social intervention, pressed towards the conclusion that the whole of Indian society stood condemned and urgently in need of reform.⁹³

How far was the official suspicion of wandering bands shared by their Indian subjects? The line between a life on the road and in sedentary occupations was made porous by diversity in sources of subsistence, ecological reversals, political enterprises, and patterns of trade and pilgrimage. But such a lifestyle was perceived by Indians as different from that of the agriculturist who had to protect his crops and property from wandering bands.⁹⁴ Every region seems to have had a catch-all label to characterize wandering communities. One peripatetic band examined by Sleeman as a dacoit tribe said they called themselves Bhats (usually translated as hards) but were called Sansias, Kanjars, Mahars, Jats, 'according to the country in which they happen to be, for they have nowhere any fixed habitations, and the people among whom they encamp, call them after the wandering or vagrant tribe, whom they appear most to resemble'.⁹⁵

One also comes across the occasional pejorative inflexion over a lack of discrimination in the social norms of those associated with a peripatetic lifestyle. Most strikingly, the narratives of members of such bands, whether termed thugs or dacoit tribes, often reveal an anxiety to defend themselves against the suspicion of social laxity.⁹⁶ For instance, the members of a Badhak gang would

⁹² Plunder obtained by murder was spent on 'debauchery and indulgence' wrote J.A.R. Stevenson, 'Some Account of the P'hansigars', p. 280. Briggs attributed the poverty of the Banjaras to their 'dissolute and wandering habits' and their drinking. 'Account of the . . . Bunajaras', p. 181.

⁹³ C.E. Trevelyan, 'The Thugs or secret murderers of India', *The Edinburgh review*, LXIV (1837), pp. 357-95. Cf. also J. Paton, BM, Addnl Ms 41300, p. 278.

⁹⁴ Balfour reports that the Bauries who obtained their living from the forest could be fined and even put to death by Indian rulers if they pilfered from fields and stacks of grain. E. Balfour, 'On the migratory tribes', p. 35.

⁹⁵ *Report on Budhuk decoits*, 1849, p. 265.

⁹⁶ Sahib Khan a thug approver from a Telina gang, claimed they were

claim that they refused admittance to Muslims, or to untouchable castes,⁹⁷ even though it is clear that such bands absorbed new members from various social strata through marriage, adoption and the drift of men from other occupations. So a certain terminology of low social status, buttressed by the interaction between British officers and upper-class Indians, could feed into the idiom of criminal communities. Conversely, the defence which some prisoners made on behalf of their status could strengthen the official argument about rule-governed criminal communities.

In conclusion, I would argue that the so-called thug gangs seized in various episodes related to the territorial expansion of the Company from the late eighteenth century, had taken shape against a background of intense military activity and its aftermath. Men could form a band and set out in search of military service, or dissemble as soldiers to attack other parties of recruits or travellers.⁹⁸ However, gang robbery on the roads was not only the preserve of mercenary bands. In the flux of state-building and given the wide dispersal of arms, peripatetic communities providing services of various sorts or bands of mendicants might occasionally take to highway robbery.⁹⁹

I am describing thuggee, therefore, as an even less structured phenomenon than that outlined by Gordon who breaks down the notion of a cohesive widespread fraternity and relates thuggee to the polity of Malwa at a particular conjuncture. He argues that it was the relative strength of the local as opposed to the overarching government in Malwa which gave a unique freedom of operation to plundering bands. Moreover, pressure in the late eighteenth century to find cash resources for paying mercenary troops led to

high-caste Muslims, vehemently denying that they were Kanjars, low-caste peripatetic grain traders. *Ramaseeana*, p. 162. One band referred to another disparagingly as *Handeewuls*, suggesting they ate in old and dirty plates. *Ramaseeana*, p. 95. Captain Ramsay said that though the Sansi dacoits were often styled Kanjars, they rejected the appellation, stating that the Kanjars were all Muslims. *Report on Budhuk decoits*, p. 253.

⁹⁷ *Report on Budhuk decoits*, pp. 253, 283, 2161.

⁹⁸ Cf. *Ramaseeana*, Appendix I, pp. 101-10, and Appendix T, pp. 294-5, for a description of this situation in Central India in the early nineteenth century.

⁹⁹ Among these would be communities such as the Badhaks, accustomed to the use of hunting weapons, and to raiding tactics, who had once formed auxiliary detachments to armies but were being marginalized by the shift to

a development in which 'every level in the power structure tended to link up with and give protection to some group of part-time marauders, to have a nonlocal source of revenue.'¹⁰⁰ 'Research to date', he concludes, 'thus suggests that what the British saw as "thug" — "a national fraternity of murderers" consisted of a small core of families, members of which had been murderers for several generations.'¹⁰¹ I argue that it was not only the strength of local government or the pressure for cash resources which sent marauders out on the roads, but also the constriction of service as conquest and the subsidiary system led to the disbanding of various sorts of military retinues. This explains the reports about bands of phansigars or thugs which surfaced from other regions in various phases of British expansion.¹⁰²

Gordon's acceptance of thuggee as a hereditary occupation also has to be qualified. Many depositions, even of thugs from Malwa, reveal that some individuals had drifted into these bands; some did not go on expedition for several years but took up cultivation or some other occupation.¹⁰³ Though a landed patron usually hovered in the background, yet some bands also seem to have taken shape from bazaar 'riff-raff', those who came to the towns in search of service.¹⁰⁴ I would also modify Gordon's

¹⁰⁰ 'Scarf and Sword', pp. 425, 428.

¹⁰¹ Ibid., p. 428 Gordon points out that many of the elements of organization which the British regarded as peculiar to the thugs were in fact common to many criminal bands. But it can be argued that such elements were common to military contingents or mercenary bands as well.

¹⁰² Cf. Deposition of Sheikh Madar of Cudjapah who had once served as a soldier with the Sultan (Tipu?). *Ramaseena*, Appendix U, p. 309. Also T. Perry papers, Addnl Mss 5376, Cambridge University Library.

¹⁰³ Cf. *Ramaseena*, Appendix X, pp. 288, 397, 411, for some depositions of suspects arrested at Dekola in 1829. Amanoolah had been with the phansigar gang for two years, Khaimraj had joined the previous year, Poorun had joined at the age of thirty but did not accompany the gang on every expedition, cultivating land instead. In his autobiography, Lutfullah, who became a Persian munshi, recounts an incident in which he encountered a Muslim thug, Juma, on the road to Gohad. Juma invited him to join his band, 'telling me that he had already found I was no more than a mercenary like himself, and even, in my young days, had no friend in the world'. *Autobiography of Lutfullah*, 1857, introduction by S.A.I. Tirmizi, 1985, p. 75.

¹⁰⁴ BC F/774/182425, for the deposition of Hcera Ahir, at Holkar's court, 29 May 1819: 'forced by hunger' he had left his village to come to Gwalior where Ram Din, who had a gang of twenty thugs, had taken him into service. *Ramaseena*, pp. 34-7 referring to a linen draper of Hingolee cantonment who

conclusion that thugs 'took to the road not just in search of any traveller, but specifically looking for bankers' agents, treasure rich traders, wealthy mercenary soldiers and pilgrims.'¹⁰⁵ Certainly, the choice of routes was structured by the probability of finding such targets. Yet the accounts given by confessing thugs of the murders committed on their wanderings support the conclusion reached by British officials, that they were willing to murder even for small pickings;¹⁰⁶ not, however, because of some ritualistic blood lust,¹⁰⁷ but because long months on the road could mean literally living from one murder to another and being able to go home only if richer haul came their way.¹⁰⁸ Off and on officials were also perplexed by the murder of beggars and attributed it to a category of thugs who kidnapped the children of the poor for sale. But sometimes the poor of necessity prey on the poor too.

engaged in thuggee, and knew other thugs living there; and *Ramaseena*, Appendix T, for the discovery in 1823 of thugs living in Jalna bazaar who had been selling items of plunder. The approver Sahib Khan had made a disparaging reference to Muder Khan's gang as one built up from 'weavers, braziers, bracelet-makers and all kinds of ragamuffins', G. Bruce, *The stranglers*, p. 69.

¹⁰⁵ Stewart Gordon, 'Scarf and Sword', p. 407. S. Nigam, 'A social history of a colonial stereotype', p. 25 for a similar position.

¹⁰⁶ '... the most trifling sum is an inducement to commit murder.' Magt Chittoor to Secy Judl Dept, 1 July 1812, *Ramaseena*, Appendix U, p. 309. 'The booty ... is often so trifling — sometimes not exceeding one rupee, or the clothes on the person's body — that it appears as if the P'hansigars, found a delight and a pastime in such deeds of blood.' J.A.R. Stevenson, 'Account of the P'hansigars'.

¹⁰⁷ This was the explanation given by a grandson of Sleeman, J.L. Sleeman, *Thug or a million murders*, 1933, p. 5.

¹⁰⁸ Cf. *Ramaseena*, Appendix T, pp. 278-82, for a list of articles found with a gang of thugs operating between Jalna and Aurangabad in 1823. These goods are sometimes the most ordinary articles of daily use, pots and pans and clothes. Among the victims whom the thugs listed were a Bairagi (a religious mendicant) some mendicant Brahmins, and a barber, whose instruments were found among the haul. Cf. *Ramaseena*, Appendix X, pp. 389-90, deposition of Amanoolah, for the murder of a *mullab* (a scholar), a Bairagi, and a barber. *Ramaseena*, p. 399, deposition of Khaimraj, for the murder of four *rasdharis* (strolling actors). Paton asked some thug approvers at Lucknow if they would murder for a rupee. Allaya denied this, Dhoosoo said judiciously, 'if we expected a share of 8 annas each we would murder him', and later again, that they would not murder for a very small sum, 'unless indeed we were hard pressed for subsistence ...'. J. Paton, BM, Addnl Ms. 41300, pp. 17, 148.

Legal Impediments?

One of the stock arguments of thuggee campaigners was that the laws of the regulation provinces could not deal with the criminal community. From about 1810, when reports began to surface in the North Western provinces of roving gangs who strangled travellers, officials had complained about the difficulty of finding enough evidence to secure conviction for murder. There were no eyewitnesses, for everyone in the party was killed. Circumstantial evidence was elusive because the deed was done by stealth. And, given the hazards of long-distance travel, relatives often accepted that the traveller was only too likely to meet with misfortune.¹⁰⁹

Magistrates therefore built their cases by tapping the same source which the Thuggee Department used more extensively later: the evidence of the accomplice who, on the promise of leniency or a pardon, turned approver.¹¹⁰ The failure of a prosecution was often attributed to some judge's refusal to believe in the existence of thuggee. It was more likely to be a problem of the paucity of circumstantial evidence to support the confession of an accomplice.¹¹¹ In the trial of cases of dacoity in early nineteenth century Bengal there had been a somewhat similar controversy about the use of the evidence of informers,

¹⁰⁹ Unless somebody very important had been murdered or substantial sums of money lost, those connected with the victims usually thought they had no hope of discovering which particular sort of calamity had overtaken the traveller and much to fear from visits to distant courts and constant attendance on the police. However, soldiers and merchants did seem to have the resources and the confidence to hunt after missing relatives and associates.

¹¹⁰ Cf. Thornton, *Illustrations*, pp. 275, 285-7, 314-15 for magistrates' proceedings on thuggee cases between 1809-14, and the use of pardons to obtain evidence. The accomplice was to receive a pardon after he had given his evidence on oath before the Sessions judge. A pardon was not supposed to be extended to anyone, very prominent in the crime or to the leader of a dacoit or thug gang. Reg 10, 1824, and Reg 1, 1829. In 1836 Sleeman suggested that this qualification be suspended because gang leaders were more dependable and had more information. WHS to W.H. Macnaghten, Secy, 27 May 1838, Home; 1838, T&D Cons B.2, No. 13, NAI.

¹¹¹ By the rules of evidence in the regulation provinces the accomplice who confessed and pointed out the place of concealment of the body had only proved his own participation in the murder. If unsupported by other circumstantial evidence, his evidence was considered insufficient to prove the guilt of those he named as his accomplices.

goindas, who operated in the twilight world between policing and criminality.¹¹²

Magistrates also complained that rules of evidence in Islamic law obstructed prosecution; for instance, that the evidence of an accomplice or of a person convicted of a heinous crime was not considered 'worthy of credit'.¹¹³ But the testimony of an accomplice was certainly admitted in British courts, whatever the ruling of the Muslim Law officers as to its weight. The provision against accepting the evidence of a convicted offender was circumvented by pardoning the accomplice who offered to turn approver; in any case approver's evidence usually had to be negotiated through the promise of pardon. More importantly, the Islamic law as it was modified and actually applied in the Company's courts posed no very great obstacle to the trial of thuggee and dacoity cases. In the course of various efforts in the early nineteenth century to combat dacoity the influence of the Muslim Law Officer's fatwa on the trial had been considerably curtailed. Section 3, Regulation 53, 1803 had empowered the judge to convict the offender if the fatwa ruled that there was a strong presumption of guilt.¹¹⁴ Further, the fatwa of the Muslim Law officers could in any case be overruled by the superior court, the Nizamat Adalat.¹¹⁵

The complaint about working through the 'technicalities' of

¹¹² In a memorandum of 1815, H. St. George Tucker had criticized the use of *goindas*, stressing the danger of 'the licensed freebooter who acts under the sanction of the law.' *Memorials of Indian government*, 1853.

¹¹³ Sherwood complained of the difficulties of the Islamic criminal law, 'which admitting not the testimony of accomplices, and rarely the sufficiency of strong circumstantial evidence unless confirmed by the confession of the culprits, their adherence to their protestations of innocence has alone, but too frequently, exempted them from punishment', *Ramaseena*, Appendix U, p. 352. It was not very clear whether the position in Islamic law was that the evidence of an accomplice was not admissible at all or whether it was not to be given any weight by the Judge.

¹¹⁴ Cf. also Construction No. 558: a fatwa convicting upon strong presumption is a fatwa of conviction, in F.L. Beaufort, *A digest of criminal law*, part I, 1857, p. 233. In the first major trial of suspected thugs held in a sessions court after the inauguration of special operations the Muslim law officers held that the prisoners were guilty to the extent of *akoo but*, strong suspicion. By the terms of Reg 53, 1803, the British judge could now go ahead and award the death sentence. Cf. *Ramaseena*.

¹¹⁵ Reg 17, s 2-4, 1817. If the Sessions Judge disagreed with the fatwa of his law officer, he could send the case to the Nizamat Adalat, which would consult its own law officers, but had the authority to make the final decision.

Islamic law has to be assessed instead in terms of the feeling in official circles that the Company should no longer disguise its legislative authority behind the forms of indigenous law. More importantly, it provided an argument for Sleeman, F.C. Smith and other officers of the Thuggee Department to press for special tribunals for thuggee cases in the regulation provinces.¹¹⁶ The real apprehension was not about the supposed obstacles of Islamic law but that approvers' evidence would not carry weight in the regulation courts if circumstantial evidence to support their statements was too slight or entirely unavailable.

The existing regulations did offer an alternative strategy which magistrates had long used against 'notorious dacoits' or 'suspected thugs' where the evidence was insufficient to convict them of a specific act. This was to demand security for good behaviour on the grounds of bad character, notoriety or bad livelihood, and confine the suspect if he could not provide it.¹¹⁷ Although this regulation was formulated as a preventive rather than punitive provision, the judge could fix the amount of security and the period for which it was demanded so as to secure long terms of confinement.¹¹⁸ Confinement of a prisoner for failure to give security was subject to periodic judicial review. However, if the reviewing judge concurred, the term of confinement could continue to be extended indefinitely, resulting in long terms of imprisonment, perhaps even for life.¹¹⁹ It was through information given by such suspects, who had spent years in confinement because of inability to give

¹¹⁶ Cf. F.C. Smith, AGG, SNT, to W.H. Macnaghten, Secy, Pol. Dept, 26 June 1833, Home, 1833, T&D, Cons B 2, No. 4, NAI.

¹¹⁷ The magistrate could demand security from the vagrant and the *bad-maash*, paraphrased in proceedings as 'of bad character', 'keeping bad company', suspected of 'bad livelihood' and keep him in confinement for a year for failure to provide it. Reg 22, s 10, s 31, s 33, 1793; Reg 17, s 10, s 29, s 32, 1795; Reg 14, cl 7, s 11, 1807; Reg 35, s 13, s 15, s 24, 1803; Reg 20, s 20, cl 2, 1817. If the prisoner's release was still considered dangerous, his case was reviewed by the Sessions Judge who could have him detained for up to three years again, if security was not given, Reg 8, s 9, 1818.

¹¹⁸ In a charge of dacoity upon 'strong suspicion, though not amounting to conviction, as well as upon proof of notorious bad character, the judge of circuit may direct the magistrate to keep the prisoner in custody till security is given for good behaviour and for appearance when required.' Reg 53, s 2, 1803.

¹¹⁹ Reg 8, s 4, s 10, 1818, Construction 771, 22 March 1833, and Construction 823, 30 August 1833.

security, that Sleeman built up his lists of thugs and later his list of Badhak dacoits.

However, judicial review did leave open the possibility of release. So some officials suggested laws which would confine 'dacoit tribes' simply for being found in the Company's domains, or subject them to special police measures, and permit fixed terms of imprisonment for notoriety as a thug. But the Nizamat Adalat rejected these proposals, arguing that such provisions would jeopardize precision in charges and the uniform application of the law, and put too much power in the hands of the police.¹²⁰ British Political officers in the chiefdoms and princely states were put under similar restraints. In 1824, when some thugs were seized in the protected states of Bundelkhand, the Assistant Agent, Lt. Moodie, had suggested that notorious thug leaders ought to be confined for life even if their participation in a particular murder or robbery could not be conclusively proved.¹²¹ However, government ordered the usual device of confinement until the prisoners gave security for good behaviour.¹²²

In the case of the Badhaks, some officials had suggested punitive measures against the entire community on the grounds of their 'notoriety as a dacoit tribe'. In 1816 the third judge of the Bareilly Court of Circuit suggested a regulation authorizing the magistrate to sentence any Badhak found in the Company's provinces to work on public projects till a zamindar stood security for his good behaviour and appearance at stated times.¹²³ However the second

¹²⁰ In 1828 the Superintendent of Police drafted an Act to punish vagrants apprehended with poison and other articles 'which may excite suspicion that they are thugs by profession'. He also suggested a fixed term of seven years for suspicion of being a thug. SP, WP to Secy Judl Dept, 19 February 1828, BCrJ P/139/13, 6 March 1828. However the Nizamat Adalat rejected the draft, one judge holding that it would mean 'legalised oppression by the police' and another that thuggee was not a sufficiently precise term and that it would be difficult to distinguish articles used for criminal purposes. Regr, NA, to Offg Chief Secy, Judl Dept, 2 May 1828, BCrJ P/139/15, 22 May 1828, No. 5.

¹²¹ Lt. Moodie to Secy Swinton, 3 February 1824, No. 44, pp. 22-39, BC F/4/984, 1828-29. Forwarding his letter, the Agent, Majoribanks wrote, 'I apprehend the circumstances of the case as reported by Lieutenant Moodie under the existing regulations of Government are not such as would justify a permanent sentence of imprisonment against them.' Ibid.

¹²² Ibid.

¹²³ He stated that such measures were justified because the Badhaks were 'professed dacoits who lived wholly by plunder.' Ross, third Judge Bareilly

judge argued that the entire tribe could not be engaged in thieving, that there were other groups reputed to be robbers but were not all so. If the Badhaks were removed they might be replaced by other bandits, and the law should also control the Rajas who sheltered them. Finally, it would be difficult to define a Badhak and the criteria for punishment ought only to be guilt or innocence.¹²⁴ In other words this judge defended the utility of laws which addressed specific acts of criminality and were universally applicable. If community was made the basis for defining criminality, where would one draw the line. He also implied that such laws put whole communities outside the state-subject relationship, thereby detracting from the legitimacy of the law. 'The Caste of our subjects called Budheks are entitled to our protection on the footing of other subjects. . . . We must deal with justice to a Budhek if it be only for the preservation of principle and to give us the right to expect justice from a Budhek.'¹²⁵

Regulations directed against a particular tribe were therefore rejected, but magistrates freely used police powers and provisions for preventive detention against suspect groups. For instance, the police would banish 'suspicious vagrants' from the district, even though this practice had been expressly forbidden by the Nizam Adalat.¹²⁶ The same second judge who had opposed a special law

CC, to Judge Bareilly CC, 21 April 1816, BC F/4/581, 1819-20, pp. 39-47. In 1822, the magistrate of Gorakhpur suggested military punishment for the Seah Murwahs (categorized as Badhaks) of neighbouring Awadh, and a regulation to sentence any Seah Murwah found in parties, to a term of confinement. R.M. Bird, Magt Gorakhpur to H. T. Prinsep, Actg Chief Secy, 11 April 1822, *Report on Budhak decoits*, 1849, pp. 13-14.

¹²⁴ '(W)here are the confines — there can be none but what justice and morality have prescribed through ages, the boundaries of guilt and innocence.' Second Judge Bareilly CC to Regr NA, 27 April 1816, BC F/4/581, 1819-20, pp. 24-33.

¹²⁵ Ibid. This judge suggested that after a regular trial all dacoits be deported to wasteland villages to serve a fixed term of labour as part of their sentence on the lines of the punishment of transportation in England. Ibid., pp. 33-7. The senior judge opposed any new measures, arguing that the powers of the magistrate to confine until security was given were adequate. However, he too held that British administration would make the Badhaks 'peaceable and industrious' as other natives, Senior Judge Bareilly CC, 1 March 1816, ibid., pp. 33-7. The Nizam Adalat approved of the suggestion that the Rajas and Thakur be made to send the Badhaks as cultivators.

¹²⁶ CC No. 159, 24 February 1810, F. Skipwith, *The magistrate's guide*,

against the Badhaks, criticized the orders given by the Agra Magistrate for banishing a whole tribe of Nats (acrobats) beyond the Jamuna, an act 'of the same value as would be the order from London Magistrate to put all Italian Opera Dancers and foreign singers across the water.'¹²⁷ Zamindars were occasionally told to expel Badhaks from their estates on the grounds that they were all dacoits. This kind of pressure is evident in the police statement of 1817 for the Western Provinces which reported that the Badhaks of Hathras and Mursan had left that area on the establishment of the Company's policing there.¹²⁸ Their being of a particular tribe was also cited to support a charge of 'notoriety for dacoity when hauled up for a particular offence.'¹²⁹

Policing Thuggee

An examination of judicial correspondence reveals a continuous flow of suggestions about the policing of 'the Stroller, the Vagrant, and . . . the fugitive from Judicial Process.'¹³⁰ The suggestions ranged from patrols and police posts along the highway to improved surveillance over traveller, but the basic problem was of distinguishing the thug from the ordinary traveller. A *rumal* (scarf), a *dhoti* (a wrap), a cord, even a knife or a sword were likely to be found on the most innocuous travellers, and certain

1843, p. 18. This must have been one of the orders most consistently ignored by magistrates.

¹²⁷ BCrf P/133/7, 14 February 1817, No. 31, paras 49-50.

¹²⁸ SP, WP to Secy, Judl Dept, 30 June 1817, BCrf P/133/14, 19 August 1817, No. 27, para 38.

¹²⁹ In a case against 163 Badhaks for raiding a treasure-boat they were charged for 'dacoity with murder' but also for 'being notorious Dacoits of the cast of Shigalkhors and Budheks . . . having . . . entered the Company's provinces with an intention to commit Dacoitee . . .'. *NAR*, II, 1820-26, p. 125.

¹³⁰ Circular, 19 June 1829, Commr of Circuit, Farukhabad to Secy, Judl Dept, 27 June 1829, BCrf P/139/42, No. 9. The village watchman was to report all suspicious strangers, the police were to obtain information from the fakir, the prostitute and the village washerman who came into contact with strangers. The fakir also came under suspicion of assisting in dacoity and thuggee, ibid. Cf. SP, WP to Chief Secy, 31 May 1814, BCrf P/131/14, 5 July 1814, No. 32, for earlier suggestions. In 1821 a regulation was passed for action against suspicious travellers but it remained a dead letter. Reg 3, s 7, 1821.

opiates and chemicals which could be used to poison or drug a fellow traveller were also in common use as a medicine, an addiction, or as substances used by craftsmen.¹³¹ Another problem was that of preventing the police, and the informers posted with them, from extorting money from travellers by threatening to send them to the magistrate on suspicion of thuggee or dacoity.

The lack of co-ordination between magistrates in assembling information about suspected thugs, wandering tribes, or suspicious bands, and in compiling evidence for prosecution, was also said to be a handicap. Even before the 1830s there were stray suggestions that information about thug gangs should be circulated among other magistrates,¹³² or compiled through the Sessions Judges or the Superintendent of Police for the Western Provinces.¹³³ However, the major reason why there was no sustained effort to coordinate action was that there was no concern at this point to present thuggee as an 'all-India system'.¹³⁴ There

¹³¹ However, the police did occasionally arrest travellers for being in possession of poisonous substances and the magistrate demanded security from them on suspicion of thuggee. Cf. abstract calendar of persons held for security by the magistrate, examined by the Court of Circuit in 1828. This included 3 persons ordered to give security of 50 rupees or face confinement of one year for having small quantities of poisonous substances in their possession. They were kept in confinement for periods between three to eleven months before they were released by the sessions judge with the remark that the grounds for requiring security were inadequate. Regr NA to Chief Secy to Govt, 18 April, No. 6, BrCJ P/139/5, 8 May 1828.

¹³² Cf. G. Stockwell, Magt Etawah to J. Waunchope, Magt Bundelkhand, 14 October, in Thornton, *Illustrations*, pp. 314–15.

¹³³ Actg Asst Magt, Farukhabad, to Magt, Farukhabad, 12 March 1810, Pre-Mutiny, Saharanpur collectorate, Judl letters from government, 1810–12, vol. 177, RAA. J. Shakespear, SP, W^m to Magistrates (nd). Basta 4, Series II, No. 28, 1812–17, RAA. The abolition of the office of superintendent of police in 1829 removed one central agency for police operations. F.C. Smith stressed this to push his case for posting a thuggee superintendent to the regulation districts of the Doab. F.C. Smith to W.H. Macnaghten, Secy, 26 June 1833. Home, T&D, List 1, Cons B.2, NAI.

¹³⁴ In a report of 7 August 1815 the Magistrate of Etawah had described the thugs of his district as of three classes, 'entirely unconnected with each other'. Magt Etawah to Acting SP, WP, 7 August 1815, *Illustrations*, p. 321. In 1816 the government expressed its satisfaction over the success of the local arrangements made by the magistrates of Kanpur and Fatehpur for suppressing thuggee. Judl letter from Bengal, 2 September 1817, PP, 1819, vol. 13, p. 754. The attempt to co-ordinate police activity over such an extensive area was a novel one for in the 1830s Sleeman had to make a special request to

was also a general impression at the time that the more regular policing of the Company's territories had driven thug operations into the native states, or that their bands were smaller and their operations more limited in the areas under British rule.¹³⁵

Thuggee as Mystery

Official accounts of thuggee in this earlier period reveal apprehensions about a criminal fraternity sharing a secret code of communication and certain cult beliefs. 'Though personally unacquainted', wrote the Marquess of Hastings, 'they had signs and tokens by which each recognized each other till the utterance of a mystical term or two announced the favourable moment, and claimed common effort.'¹³⁶ The members of the bands who were arrested sometimes agreed with this proposition, either to claim magical potency, or in empathy with others engaged in the same activity.¹³⁷ In a deposition taken by the magistrate of Chittoor the prisoner Yeroogaudoo said the Phansigars 'show signs by the hands and speak *Bundooocuttoo Mantaloo*, words unknown by others.'¹³⁸

The use of a common slang suggests a long association between individuals, and shared participation in past events. A shorthand in words or signs to co-ordinate action without putting travellers

the Surveyor-General for a skeleton map of India with routes, halting posts, ferries, military establishments and jurisdictions, marked out on it. G. Bruce, *The stranglers*, pp. 87–8.

¹³⁵ Sherwood, *Asiatick researches*, pp. 271–2. Extract political letter from Bengal, 24 July 1819, no. 46, in BC F/4/744, 1824–25. Agent in Bundelkhand to Secy Swinton, 28 February 1824, extract Bengal Pol. Cons, 20 April 1824, BC F/4/ 984, 1828–29. Bengal Judl letter, 12 July 1827, referring to the seizure and trial of thugs in Jabalpur, in BC F/4/1159, p. 172. However the insertion of a heading 'murder by thugs' in the police statements of the Western Provinces from 1810 indicates a concern to have a regular estimate of this crime. But this category was not inserted in the police statements of the Lower Provinces.

¹³⁶ *Ramaseena*, p. 18. The Marquess of Hastings said he had asked Sindhia to put down this 'nefarious fraternity'. Ibid.

¹³⁷ Cf. *Ramaseena*, p. 155. 'A vulgar idea prevails', reported a magistrate in 1810, 'that the Thugs have recourse to sorcery to assist them in encompassing their hellish purposes'. Actg Asst Magt Farukhabad, 12 March 1810, Saharanpur collectorate, Judl letters from Govt, 1810–12, vol. 177, RAA.

¹³⁸ Deposition of Yeroogaudoo, 2 February 1811, *Ramaseena*, Appendix U, p. 325.

on their guard is also an essential prerequisite for concerted action. Sherwood said the Phansigars used words and phrases not understood by others to communicate with each other, calling it *pheraferi-kibaut*, the language of dispatch or emergency.¹³⁹ Thugs did drift from one band into another, and bands who operated with regularity along a certain stretch of road would come to recognize each other.¹⁴⁰ But that a term of greeting revealed another offender even if they had never met before suggests officials were susceptible to apprehensions about conspiratorial fraternities. It must also be noted that bands who spent long periods on the road would have to pick up a language which would enable them to communicate across various regions. *Bazigars* (wandering acrobats) from Bengal were reported to use two languages, both based on Hindustani, the one for their craft, and the other for general communication.¹⁴¹

Thuggee was also understood to rest on an attachment to hereditary profession characteristic of Indian society.¹⁴² Officials argued that its adherents did not recognize the immorality of their life or experience remorse because they believed they had a religious sanction for their murders. This caste-like attachment to hereditary profession was asserted even though it was known that thugs were drawn from Hindus of different castes and from Muslims. When Sherwood tried to trace their origin along the line of religion he had the problem of deciding whether to do so by formal

¹³⁹ Sherwood, *Asiatic researches*, p. 265. But he also says it was used to check whether another traveller was of the same fraternity. The words he lists in his article suggest a slang rather than a language — there are words or phrases which any one might use in recounting a joke, or an anecdote, as for instance the use of *shaic'hji* for a Muslim, or the word *nyamet*, grace of god, for a promising target.

¹⁴⁰ Cf. deposition of Imamee, 19 August 1831, *Selections from the Nagpur residency records*, IV, pp. 270–4. Reynolds noted the keen interest taken by one gang in the progress of another gang and their readiness to supply information about their own movements. 'Note on the Thags', p. 212.

¹⁴¹ Captain D. Richardson, 'An account of the Bazeegurs, a sect commonly denominated Nuts', *Asiatic researches*, vol. VII, 1801, p. 465. These wandering groups, he says, occasionally came under suspicion of criminal activities, *ibid.*, pp. 471–2.

¹⁴² '(T)hey can rarely claim . . . strong pecuniary temptation. . . . "Phansigari", they observed . . . "is their business", which, with reference to the tenets of fatalism, they conceive themselves to have been preordained to follow.' Sherwood, *Asiatic researches*, pp. 260, 268–9.

affiliation, which in south India he believed to be mostly Muslim, or by religious practice, their divinities, rites and belief in omens, which seemed to be Hindu.¹⁴³ The method which they used to kill travellers was also highlighted to stress their distinctiveness as a criminal society. However in these earlier accounts strangling was not given the kind of ritualistic importance which officers subsequently attributed to it in defining thuggee.¹⁴⁴

These sporadic efforts to distinguish the organizing principles of thuggee were transfigured into an image of certain and definite knowledge in the 1830s. The narrative of mystery unveiled and mastered caught the imagination of the British public, and it was the religious-cultist aspects of the 'system' which were emphasized for the reader of many a memoir of India.¹⁴⁵

The Prosecution of Thuggee, 1829–1836

A communication from Chief Secretary Swinton of 23 October 1829 was often cited as the official declaration of a new initiative.¹⁴⁶ Captain Borthwick, the political agent at Mahidpur, had submitted the deposition of one Amanullah and five others of a thug gang he had seized in 1829. Amanullah had confessed and revealed the burial spot of the murdered travellers. Five other prisoners followed suit on a promise of pardon. Borthwick argued that no additional proof was required to convict the entire gang, the Indore resident agreed, and in its letter of 23 October 1829 the Government accepted that the evidence was enough to pass sentence:

These murders having been perpetrated in territories belonging to various Native Chiefs, and the perpetrators being inhabitants of various districts belonging to different authorities, there is no chief in

¹⁴³ *Ibid.*, pp. 280–1.

¹⁴⁴ In 1819, the Resident of Indore described the thugs as using a noose and a sword to kill their victims. Extract Bengal Pol. Cons, 24 July 1819, No. 46, BC F/4/774, 1824–25. Charles Hervey 'corrected' Shakespear's early account for his statement that the thugs could use poison, the cord or the knife. 'It being traditionally forbidden to Thugs to shed blood . . . "the knife", supposed in the above extract to be habitually used, was religiously shunned.' C. Hervey, *Some records of crime*, vol. I, 1892, p. 72.

¹⁴⁵ Cf. A. Sattin (ed.), *An Englishwoman in India*, 1986, pp. 24–5, also *Tigers, durbars and kings*, p. 28.

¹⁴⁶ G. Swinton, Chief Secy, to Major Stewart, Offg Resident, Indore, 23 October 1829, *Ramaseetana*, Appendix X, pp. 379–84.

particular to whom we could deliver them up for punishment, as their Sovereign, or as the Prince of the territory in which the crime had been committed.

The hands of these inhuman monsters being against everyone, and there being no country within the range of their annual excursions from Bundelkhand to Guzerat, in which they have not committed murder, it appears that they may be considered like Pirates, to be placed without the pale of social law, and be subjected to condign punishment by whatever authority they may be seized and convicted.¹⁴⁷

F.C. Smith, the Agent at Sagar, and Sleeman, one of his political assistants, hailed this letter as establishing the principle that the paramount power had assumed a responsibility for the trial of thugs in the Indian states and that a recognized judicial terrain had opened up under the aegis of the Political Department.¹⁴⁸ The other deduction was that in this judicial terrain the evidence of approvers might have greater weight than in the regulation courts.¹⁴⁹ A gang long confined without trial for insufficient evidence was now put on trial by F.C. Smith and convicted on the evidence of eight of them who had turned approver.¹⁵⁰ Sleeman was appointed Superintendent of thuggee operations under F.C. Smith who, in his judicial capacity as Commissioner, tried thugs seized from neighbouring Indian states and from British territory. As cases accumulated, the residents of Hyderabad, Lucknow and Indore also began to hold trials.¹⁵¹

¹⁴⁷ Ibid., pp. 380–1. Borthwick was instructed to examine the five approvers separately about the identity of each prisoner and his connection with the gang. If a comparison indicated some doubt that a prisoner was a gang-member his case was to be reserved for further orders. Capital punishment was prescribed for the leaders and for the actual stranglers, transportation for life with hard labour for those who had decoyed travellers or helped to conceal bodies. Ibid.

¹⁴⁸ F.C. Smith to H. Prinsep, Secy, Pol. Dept, No. 1866, 19 November 1830, Mss Eur D1188, pp. 78, 87.

¹⁴⁹ In the case of a gang arrested by Sleeman in February 1829, whose murders had, with one exception, been committed in the Indian states of Bhopal and Gwalior, the Government again accepted that 'for want of regular jurisdiction' the trials could be conducted by the Agent instead of being referred to the Judicial Department. Chief Secy, Pol. Dept, to F.C. Smith, AGG, SNT, 4 August 1830, Mss Eur D1188. Cf. also F.C. Smith to H. Prinsep, Secy, Pol. Dept, 19 November 1830 arguing along the same lines. Ibid., pp. 77–8.

¹⁵⁰ F.C. Smith to Prinsep, 19 November 1830, *ibid.*, pp. 77–85.

¹⁵¹ W.H. Macnaghten, Secy to G. Swinton, Chief Secy, 25 June 1832, Mss Eur D1188, p. 147. *Ramaseena*, Appendix A, n.

However, some British residents protested that the intrusion of thug-hunting detachments was putting a great strain on the relationship with the Indian state.¹⁵² They also said that arrests made under the direction of approvers and the removal of prisoners to distant courts for trial without any preliminary defence was causing considerable unease.¹⁵³ The Thuggee Department defended its measures by pointing out that Indian princes and chiefs did not refuse their protection, *sharan*, even to known plunderers, due to a 'besotted and ignorant point of honour',¹⁵⁴ and that they would merely mulct these gangs and release them, instead of executing them.¹⁵⁵

It is significant that the Court of Directors had sanctioned these operations as necessary only in recently acquired territory or in the native states:

The enormities of the Thugs are mostly committed in our newly acquired possessions, or in the Territories of the Native Chiefs of Bundelkhand, Malwa and Rajpootana. The supineness or connivance of those Chiefs prevents them from adopting any effectual means of repression, and enables the Officers of these Governments and many of their Subordinate Jageerdars to shelter the Thugs from whom they receive a portion of the fruits of their crimes. For these reasons and for the sake of greater promptitude it was necessary for you to take the conduct of these operations against these people into your own hands . . .¹⁵⁶

It was only in 1835 that the expenses of the thuggee agency were included as a 'General charge being incurred for the welfare of the whole of India' instead of being accounted to the Sagar

¹⁵² R. Cavendish, Resident Gwalior, to W.H. Macnaghten, 17 May 1832, Mss Eur D1188, pp. 145–6. A. Lockett, AGG, Rajputana Agency to W.H. Macnaghten, 23 July 1832, *ibid.*

¹⁵³ G.T. Lushington, Political agent Bharatpur, to AGG, SNT, 13 June 1832 and to Colonel A. Lockett, AGG, Ajmer, June 1832, Mss Eur D1188, pp. 152–60.

¹⁵⁴ F.C. Smith to Chief Secy, 20 June 1832, *CLWCB*, II, p. 842. Cf. also WHS to Captain Benson, 22 November 1832, on the prejudice 'common to all natives in a rude state of society, in surrendering a murderer who has once sought their protection.' Ibid., p. 948.

¹⁵⁵ F.C. Smith to G. Swinton, 5 July 1830 in *The stranglers*, p. 79. F.C. Smith to W.H. Macnaghten, 29 May 1832, Mss Eur D1188, p. 133.

¹⁵⁶ Letter from COD, 28 November 1832, No. 11, para 3, Home, 1833, T&D, Cons B.2, No. 3, NAI.

and Narbada territory alone;¹⁵⁷ and that Sleeman was given the designation, General Superintendent instead of simply Superintendent.¹⁵⁸

The grafting of thuggee operations onto the administrative structure of the nonregulation tracts and its extension to the princely states through the British residents inaugurated a web of negotiations under the Political Department around the arrest and trial of suspected thugs. The thuggee operations added to a range of other pressures to reshape the politics of the Indian states in line with the fiscal and pacificatory imperatives of the Company, even as intervention in their internal affairs was constantly disavowed. The jurisdiction claimed by thuggee assistants and British residents challenged competing zones of 'lordship' within the Indian states because ability to give sharan carried with it claims over men and over revenue. In Rajputana sharan was organized not only around a patron but also territorially. Certain villages belonging to the *Bhats* were regarded as sanctuaries by those seeking refuge from a revenue collector or from some powerful chief. In 1840 the government began to assert that such sharans could become asylums for thugs.¹⁵⁹ Sometimes the regiments of Indian rulers now being drawn under British supervision also displayed a fierce resistance to such interventions.¹⁶⁰ Even where the rulers were co-operative, the thuggee officers found that attempts to arrest suspects often pitched them into armed engagement with turbulent tributaries.¹⁶¹

¹⁵⁷ Agra Progs, 21 February 1834, no. 14, Agra Narrative, December 1834-35, UPsA.

¹⁵⁸ W.H. Macnaghten, Secy, Pol. Dept, to F.C. Smith, 7 February 1835, No. 272, Foreign Pol., 5 March 1835, Nos 167-8, NAI.

¹⁵⁹ Foreign Political Progs, 23 November 1840, nos 21-22, in P.S. Mukharya, *The administration of Lord Auckland*, 1979. *Bhats*: bards.

¹⁶⁰ Colonel Sutherland, the Gwalior Resident, asked Sleeman to drop his request for the apprehension of thugs sheltering within the ranks of the Gwalior contingent. WHS to Captain Graham, 8 February 1839, Home Dept, T&D, Cons G.8, July 1838-April 1839, letter 2505, NAI. Cf. Meadows Taylor, *The story of my life*, p. 72 describing a similar situation of 'indiscipline' within the Nizam's levies.

¹⁶¹ Captain Malcolm, an Assistant in the Nizam's territory, complained that though some taluqdars were willing to assist, the headmen of villages held on military and other rent-free tenures would not obey them, and barred the village-gates against thug pursuing parties. Captain Malcolm to Captain Reynolds, Supdt, Deccan, received by WHS, 23 November 1840, in W.H. Sleeman, *Report on the depredations committed by the thug gangs of upper and central India*, 1840, p. xxi.

If one aspect of the campaign was bound to the reshaping of the norms and claims of paramountcy, the other significant feature was the procedural flexibility with which it was conducted. If the thug trials had been conducted in a sessions court of the Bengal Presidency the proceedings would have come under the scrutiny of a superior court, the Nizamat Adalat. But the trials conducted by the Agent at Sagar or by the British residents at Indian courts were only submitted to the Secretary of the Political Department.¹⁶² At one point the government even permitted the resident at Lucknow and the Agent at Sagar to carry their sentences into execution without waiting for confirmation.¹⁶³ The unstructured nature of this judicial terrain opening out under the aegis of the Political Department was used to full advantage by the Thuggee agency. Sleeman later asserted that had the thugs arrested in 1830 been committed before the judges of the regulation courts alone, the attempt to suppress thuggee would have failed. But because the first commitments were made before the residents of Hyderabad and Indore and the Governor-General's Agent in the Sagar and Narbada territories, the trials had succeeded in convincing people of the need to put the 'system' down.¹⁶⁴

Knowledge and Prosecution

These developments generated an enormous expansion in the volume of reports and publications, official and popular, about thuggee. The information assembled was not in fact so very different from that in earlier accounts of thuggee. What was different, however, was the confidence with which these publicists proclaimed the penetration of its mysteries. 'I am satisfied', wrote Sleeman, 'that there is no term, no rite, no ceremony, no opinion, no omen or usage that they have intentionally concealed from

¹⁶² It was only in 1835, when the Sagar and Narbada territories were merged with the Agra Presidency, that its revenue and judicial arrangements came under the supervision of the Board of Revenue and the Sadar Adalat.

¹⁶³ W.H. Macnaghten, Secy, to Low, Resident, Lucknow, and to F.C. Smith, AGG, 23 February 1838, J. Paton, BM Addnl Mss, 41,300, pp. 352-3. Cf. COD to Bengal Govt., India, Pol. Dept, Misc. 21 February 1838, no. 13, pp. 974-8, expressing their unease that a political officer could inflict capital punishment without revision or appeal. BC II/4/753.

¹⁶⁴ W.H.S. to J.G. Lumsden, Secy, Judl Dept, Bombay, November 1850, Home, T&D, List 1, Cons B.2, NAI.

me. . . .¹⁶⁵ To the fifty-seven words which Sherwood had collected, Sleeman added others and presented *ramasi* (slang?) as *Ramasecana*, thug 'language'.¹⁶⁶ Henry Spry, medical officer sent off seven skulls of thug leaders executed at Sagar to the phrenological society at Edinburgh to add to the sum of human knowledge about the influence of caste and religion on the 'lower feelings' in the human brain.¹⁶⁷

The body of knowledge presented by thuggee officials had a very significant connection with their presentation of a case for special procedures. The drawing of the history of thuggee into the distant past, the recording of details about this 'religion of murder', its omens, rites and prohibitions, heightened the impression of an entrenched system which only the most rigorous measures could combat. What was being reiterated in various ways was the proposition 'once a thug, always a thug'. A thug could not be treated in the same way as a casual or one-time offender.¹⁶⁸

In the regulation provisions the accusation alone of a confessing prisoner or prisoners, was in theory insufficient to justify a warrant of arrest.¹⁶⁹ However the Thuggee Department issued warrants solely on the basis of approvers' depositions, claiming that they took precautions to prevent collusion and to crosscheck evidence.¹⁷⁰

¹⁶⁵ *Ramasecana*, 1836, introduction, p. 3.

¹⁶⁶ In Sleeman's subsequent publication, *Report on Budhuck decoits*, Malchand, a 'Sansee dacoit', refers to *ramasi* as slang, p. 271.

¹⁶⁷ H.H. Spry, 'Some account of the gangmurderers of Central India commonly called thugs', *The phrenological journal and miscellany*, viii (December 1832–June 1834), pp. 511–30. Cf. M. Atlas, *Machines as the measure of men*, 1990, pp. 292–6, for the influence of phrenology in the first half of the nineteenth century in confirming beliefs about innate differences between racial groups.

¹⁶⁸ A 'known' thug could not be released back into society, even if his participation in a specific act of murder had not been conclusively proved. F.C. Smith to Chief Secy to Govt, 20 June 1832, *CLWCB*, II, p. 844.

¹⁶⁹ The magistrate was not to commit any person for trial or hold him to security solely because of the accusation of confessing prisoners that he was their accomplice, though he could order further enquiry. *CONA*, 20 November 1815. Sleeman argued that a change was needed in the rules 'that the testimony of any number of confessing prisoners shall not be considered a sufficient ground to authorise the detention of their associates.' *Ramasecana*, pp. 51–6.

¹⁷⁰ At the most, argued Sleeman, the innocent would suffer the inconvenience of temporary imprisonment, a possibility which could be accepted given the extent of the evil they were contending with. *Ramasecana*, p. 52.

Sometimes thug-hunting detachments were even given a general warrant to arrest any person pointed out by the approvers.¹⁷¹ Critics charged that these procedures gave the arresting party opportunities for extortion and too much power to the approver to accuse one party or to conceal another.¹⁷² In one case Dharam Khan, a police official of Mainpuri, sent out with a general warrant to arrest thugs, set up a gang of thugs himself!¹⁷³

Officials asserted that as thuggee was a hereditary system there was no injustice in arresting the wife and children of a thug leader to make him surrender.¹⁷⁴ The same argument justified arrests of those related to 'known thugs', with the relationship being cited as part of the evidence against them in the trial.¹⁷⁵ The idea that male children were contaminated by the cult underwrote the practice of detaining boys seized with the gang, or those who had joined their approver fathers at Lucknow or Jabbalpur, though there was no evidence of their participation in a murder.¹⁷⁶

¹⁷¹ '(T)hough the use of spies and general Warrants', wrote F.C. Smith, 'will . . . occasionally create great evils . . . it must be submitted to, as the least of the evils attending such a depraved state of society. . . .' F.C. Smith to G. Swinton, Chief Secy, No. 908, 19 November 1830, *Mss Eur D1188*, p. 71.

¹⁷² Cf. Extract letter from COD, 28 November 1832, No. 11, List 1, Cons B.2, NAI and letter from COD, Pol. Dept, 15 July 1840, No. 26, expressing reservations about general warrants; India and Bengal despatches, E/4/763, 10 January 1840–30 September 1840; Commr Patna to Offg Magt, Patna, 11 July 1834, complaining of the extortion of a party sent out with a general warrant to arrest thugs. Home, T&D, Cons B.2, No. 5, NAI.

¹⁷³ F.C. Smith to Secy, Pol. Dept, 19 November 1830, *Mss Eur D1188*. Some approvers sent out with certificates of identity exempting them from the death penalty and transportation were found to be loaning them to their friends for 'bad purposes'. WHS, circular, 31 August 1838, Home, T&D, Cons G.8, July 1838–April 1839, NAI.

¹⁷⁴ F.C. Smith to Prinsep, Secy, 19 November 1830, *Mss Eur D1188*, p. 90.

¹⁷⁵ F.C. Smith recommended that two artillery men serving the Raja of Bejanur should be kept under arrest for a long time, perhaps for ever, because their father was a convicted thug, and their uncle a notorious one whose two sons had been punished for thuggee. F.C. Smith to Chief Secy, Pol. Dept, No. 1158, 26 May 1832, *Mss Eur D1188*. Low, resident at Lucknow, said he assembled information about the relationship of thugs as part of the collateral evidence against them. J. Low to W.H. Macnaghten, 1 November 1838, J. Paton, BM, Addnl *Mss* 41300, p. 348. W.H. Macnaghten to Resident, Hyderabad, 18 August 1833, Home, T&D, 1833, Cons D.1, No. 3, p. 264, NAI.

¹⁷⁶ F.C. Smith stressed the impossibility of reclaiming sons of thugs. F.C. Smith to Prinsep, Secy, Judl Dept, 19 November 1830, *Mss Eur D1188*, pp. 91–2. Some boys apprehended with a gang were confined for inability to

Government had ordered the Indore resident to sentence everyone in the gang seized by Borthwick in 1829 to terms of imprisonment. This included followers engaged in menial duties, such as syces, grass-cutters and boys under fourteen.¹⁷⁷ Apprehensions of contamination also made the government reluctant to release pardoned approvers.¹⁷⁸ The principle that punishment should be scaled to the prisoner's involvement in the specific act of murder began to blur.¹⁷⁹ In the Regulation provinces, if a suspected thug could not be convicted for a specific murder, the judge could only order confinement till he provided security. However, in these trials conducted by the Agent at Sagar and by British Residents at princely courts, prisoners deemed thugs 'by profession' were being directly sentenced to confinement, either 'for life or 'till they could be released without danger to the community'.¹⁸⁰ In the Amurpatan case, tried in the 1832-33 sessions at Sagar, all those present at a murder were sentenced to branding and transportation for life on such charges as 'proved to have followed the profession of Thuggee from his youth', 'proved to be a Jemadar of Thugs and a hereditary thug'.¹⁸¹ 'To release on security a thug', said F.C. Smith, was 'folly

provide security for good behaviour. Others were detained with their fathers who had turned approver and a thug colony grew up in Jabbalpur and Lucknow.

¹⁷⁷ Swinton, Chief Secy, to Resident Indore, 23 October 1829, *Ramasecama*, p. 381.

¹⁷⁸ Ibid., pp. 381-3. It was argued that unlike other accomplices who turned 'kings evidence', thug approvers should be taken into service to detect thugs and kept under surveillance instead of being pardoned. F.C. Smith to Prinsep, Secy, Judl Dept, 19 November 1830, *Mss Eur D1188*, pp. 91-2.

¹⁷⁹ On F.C. Smith's trial of 74 thugs in November 1830, government ordered that those present at a murder be sentenced to transportation for life, even if they had not personally assisted in the act. G. Swinton, Chief Secy to F.C. Smith, 2 April 1832, Home, T&D, Cons D.1, No. 1, 1831, *NAI*. 'There are several prisoners', reported F.C. Smith of the fourth set of thug trials at Sagar, 'upon whom I have passed sentences of imprisonment for life, or for such period as it may be deemed unsafe to release them on security. They are either youths or persons proved to be thugs, but not to have been present at any particular murders.' F.C. Smith to G. Swinton, No. 888, 8 May 1832, *Mss Eur D1188*, p. 127 (emphasis added).

¹⁸⁰ No mention was made of fixing a period for judicial review. Cf. for instance, G. Swinton, Chief Secy, to Major Lov, Resident Gwalior, on the trial of Drigpal and Ramchund. *Mss Eur D1188*, p. 114.

¹⁸¹ W.H. Macnaghten, Secy to Government, to F.C. Smith, 1 November 1833, Home, T&D, Cons D.1, No. 4, 1833, *NAI*.

and ignorance', an application of English notions to a country to which they were unsuitable.¹⁸²

In the opening phase of the campaign the Thuggee Department also favoured the unhesitating use of capital punishment. The thugs, said F.C. Smith, had to be met in their own way, 'by a rigid adherence to the law of [vengeance] — blood for blood'.¹⁸³ One of his arguments for keeping thug trials out of the jurisdiction of the Nizamat Adalat was its 'nervous dread of the responsibility of punishing capitally in cases of numerous criminals . . .'.¹⁸⁴ The group hangings of thugs at Jabbalpur and Sagar in 1830-2 were supposed to give the populace a forceful sense of the reshaping of order under British paramountcy.¹⁸⁵ Yet, such dramatic exhibitions were soon curtailed in favour of imprisonment for life for those convicted of 'belonging to a thug gang'.¹⁸⁶ Some reports had hinted that in comparison with the penal practices of Indian rulers, the paramount power seemed to be undertaking its mission of benevolence in too bloody a fashion. D.F. Mcleod, a thuggee assistant, stated that Indian rulers seldom awarded the death sentence to thugs even when the bodies of the victims were pointed out, unless the relatives were there to demand retribution.¹⁸⁷ In addition, there was some hesitation at Calcutta about

¹⁸² F.C. Smith to Chief Secy, 20 June 1832, *CLWCB*, II, p. 844.

¹⁸³ F.C. Smith to Chief Secy, 20 June 1832, *CLWCB*, II, p. 845, and F.C. Smith to Prinsep, Secy, 19 November 1830, *Mss Eur D1188*, pp. 77-85. The eagerness to highlight the evil of thuggee and British mastery over it is illustrated by another penal provision. The punishment of branding had been abolished for prisoners sentenced to temporary imprisonment. However thug prisoners sentenced to limited terms were to have the words 'convicted thug' tattooed on their faces, a deviation, 'fully warranted by the enormity of the crime of Thuggee which justly placed those who practised it beyond the pale of the Social Law.' G.W. Swinton, Chief Secy, to F.C. Smith, 4 August 1830, *Mss. Eur D1188*.

¹⁸⁴ F.C. Smith to W.H. Macnaghten, Secy, 26 June 1833, Home Dept, 1833, T&D, Cons B.2, No. 4, *NAI*.

¹⁸⁵ Between 1830 and 18 July 1832, 146 thugs were hung at Jabbalpur and Sagar. H.H. Spry, *Modern India*, I, 1837, p. 168.

¹⁸⁶ Cf. chapter six for the way in which the condemned men did not exactly follow the script set out for them and the spectators responded somewhat uncertainly.

¹⁸⁷ D.F. Mcleod to F.C. Smith, 10 October 1834, Foreign Dept, Poi. Cons, 11 May 1835, No. 78, para 36, *NAI*. He opposed capital punishment for thugs, saying it went against the 'sense' of the community, *ibid.* The Resident of Lucknow also advocated transportation rather than capital punishment

the legal propriety of sentencing a prisoner to death when proof of his participation in a murder rested only on the evidence of approvers. On 18 August 1833 the government ordered that if approvers' depositions were the only evidence for an individual's participation, the sentence was to be limited to imprisonment for life and branding on the forehead.¹⁸⁸ Life imprisonment therefore emerged as a sort of median punishment for a prisoner deemed to be a thug by profession.

The striking feature about these trials held under the aegis of the Political Department was that there was no such offence of 'being a thug by profession' in the Bengal regulations. More broadly, the procedures of arrest in the non-regulation provinces were characterized by a cutting of corners; and in the trials a greater weight was conceded to the evidence of approvers.¹⁸⁹ A letter from the Court of Directors of 28 November 1832, shows they had been left far behind the pace of developments. They instructed that no person should be convicted on the mere evidence of accomplices unless confirmed by circumstantial evidence, and that no person be convicted 'merely for being reputed a thug or being in the company of thugs, without satisfactory evidence bringing home . . . individually, a participation in some specific offence.'¹⁹⁰ In fact the thuggee operations which had taken shape in the non-regulation tracts and the Indian states were to leave their impress upon the legal framework of the regulation provinces as well.

because the Awadh government very rarely inflicted capital punishment. J. Low to Secy, Govt, 1 November, J. Paton Addl Ms 41,300, pp. 338-51, BM. Such exhibitions also seem to have made the approvers rather too nervous about their own fate.

¹⁸⁸ W.H. Macnaghten, Secy, to Lt. Col. Stewart, Resident Hyderabad, 18 August 1833, Home, T&D, Cons D.1, No. 3, 1833, pp. 204-68, NAI. The Court of Directors approved of the decision to commute the death sentence in such cases. Letter from COD, 16 April 1834, No. 8, Home Dept, 1833, T&D, Cons B.2, No. 6, NAI.

¹⁸⁹ W.H. Macnaghten, to AGG, SNT, 7 November 1833, paras 38-42, Home, T&D, 1833, Cons D.1, No. 4, NAI.

¹⁹⁰ Letter from COD, 28 November 1832, No. 11, Home, T&D, List 1, Cons B.2, Sl. No. 3, 1833, NAI. The Directors also asked that the strategy of imprisoning the wives and children of suspected thugs be very sparingly used. Ibid.

Legal Restructuring in the Regulation Provinces

As thug-hunting detachments began to cross into the Doab and make arrests in the regulation districts, the friction between the Thuggee Department and the executive and judicial establishment of the Bengal province increased. In part, this was due to the tension between the 'Politicals' and the 'Covenanted Service' over administrative posts. In an era of peace and military retrenchment Sleeman and other military men in the Political Service may well have sought to extend the range and influence of the offices they could command.¹⁹¹ But the judicial terrain opening up under the Political Department also posed a disruptive potential for the procedures of the regulation courts. Were the prisoners to be taken to Sagar for trial or committed to the Sessions court of the district in which the crime was committed? F.C. Smith and Sleeman cited a lack of co-ordination between magistrates, particularly since the office of Superintendent of Police for the Western provinces had been abolished in 1829.¹⁹² They argued that the courts and their regulations were fundamentally unsuitable for the trial of thuggee cases.¹⁹³ Special tribunals were needed, wrote F.C. Smith, because:

The Thugs . . . are Citizens of India and not of any particular division . . . no Court constituted according to the regulations, can either claim a sufficient Jurisdiction to try them for their entire crimes in expeditions of so extensive a range, nor obtain evidence sufficient to satisfy Justice crippled by the technicality of law and that law the Koran.¹⁹⁴

He argued that the principle expressed in Swinton's letter of 23 October 1829, that thugs should be tried by the authority that

¹⁹¹ Cf. J. Beames, *Memoirs of a Bengal civilian*, 1961, pp. 125-6 for bitter complaints against military interlopers who stopped promotions. I owe this suggestion about the influence of bureaucratic aggrandizement on the thuggee campaign to Dr Sumit Guha.

¹⁹² F.C. Smith to W.H. Macnaghten, Secy, 26 June 1833, Home Dept, 1833, T&D, Cons B.2, NAI.

¹⁹³ They argued both that thugs must not be allowed to take refuge in the 'land of rules and regulations' and that thuggee was as prevalent within British territory as outside it. WHS to Captain Benson, 22 November 1832, *CLWCB*, II, p. 947. F.C. Smith to Chief Secy, 20 June 1832, *ibid.*, p. 839.

¹⁹⁴ F.C. Smith to W.H. Macnaghten, 26 June 1833, Home, T&D, Cons B.2, No. 4, NAI.

had seized them, should be applied to the regulation provinces as well. Either a special court presided over by one judge and responsible solely to government should be constituted, or the Sagar authorities should try all thugs arrested by them.¹⁹⁵ Stockwell, the Commissioner of Allahabad division and a sympathizer,¹⁹⁶ was appointed Special Commissioner to try the first set of thug cases held in the Doab after the inauguration of the campaign.¹⁹⁷

The government eventually decided that special courts in the regulation districts outside the supervision of the Nizamat Adalat would be institutionally too disruptive. The Court of Directors' anxiety about the lack of supervision over the courts set up under the Political Department may also have influenced this decision.¹⁹⁸ However, judges were specially appointed to try thuggee cases even in the regulation provinces,¹⁹⁹ and thuggee Superintendents had considerable flexibility in choosing the court of trial.²⁰⁰ To integrate the thuggee trials into the existing framework of criminal justice, the concept of the professional or hereditary criminal had to be formulated in substantive law. Act XXX of 1836 rested on the proposition that criminal intention could be assessed not only

¹⁹⁵ Ibid. Sleeman suggested a special Commissioner of police answerable only to the Governor-General for the trial of all thugs seized in the Western Provinces and in the native states. WHS to Captain Benson, 22 November 1832, *CLWCB*, II, pp. 949–50. He was suggesting a merger of executive and judicial powers as in the nonregulation provinces.

¹⁹⁶ F.C. Smith to W.H. Macnaghten, 26 June 1833, para 7, Home Dept. 1833, T&D, Cons B.2, No. 4, NAI.

¹⁹⁷ His sentences were submitted directly to the Government instead of to the Nizamat Adalat. *Ramaseena*, Appendix A, Cf. also WHS to J.G. Lumsden, Secy, Judl Dept, Bombay, 1 November 1850, Home, T&D, Cons B.2, pp. 8–9, NAI.

¹⁹⁸ It is worth noting the careful phrasing of Auckland's assurance to the Court of Directors that the proceedings of the magistrates, whether of the Civil Service or not, 'in our districts' were 'properly reconcilable to the principles of Criminal justice'. Minute by GG Auckland, 7 December 1840, General Dept, Minute Book, vol. v, BM Addl Ms 37,712 (emphasis added).

¹⁹⁹ Cf. *CONA*, No. 11, 15 June 1838, p. 224.

²⁰⁰ Trials for offences committed *exclusively* in the regulation provinces were to be held in the sessions courts. But thug prisoners accused of crimes both inside and outside regulation territory could be committed before the Agent to the Governor-General at Sagar. Act XLX of 1837 gave further flexibility in the choice of court: any person charged with murder by thuggee, or under Act XXX of 1836, could be committed by any Magistrate or Joint Magistrate for trial before any competent court.

from a specific criminal act but from the characteristics of a collectivity. These characteristics were believed to spring from a rooted way-of-life criminality which, however, was not defined by the Act.

To what extent had the legal procedures of the regulation provinces been receptive to this position before the passing of Act XXX of 1836? The issue of criminal intention, as I pointed out, had been of crucial importance in executing the shift from modes of personal restitution to punishment on behalf of public justice. In altering the terms of judgement the regulations also deduced criminal intention from attempt to commit a particular crime. A party arrested in circumstances which suggested an intention to commit theft or dacoity could be punished under a specific clause.²⁰¹

The existing law on certain offences also permitted the enhancement of penalties on the attribution of repeated or professional criminality. Regulation 53 of 1803 imposed a heavier sentence for a repetition of the offence of dacoity.²⁰² In addition, certain criminal 'professions' such as forgery and 'receiving of stolen property' were classified as heinous crimes in police returns and judges sometimes made a distinction between professional and casual receivers of stolen property in sentencing.²⁰³ These regulations kept the specific act of criminality in focus, but the concept of criminality by profession encouraged the conclusion that the offender was 'irreclaimable', and it was this proposition which was extended by Act XXX of 1836. Magistrates and judges

²⁰¹ Persons going forth with a gang of robbers to commit dacoity, but apprehended before the act, could be sentenced to imprisonment with hard labour upto 7 years, Reg 53, s 4, cl 4, 1803. A person found with a *send katee* (an iron instrument) used for *nakabzani* (digging holes in walls to effect entry) on his person could be detained and put to work on the public roads till he gave security or was discharged by the Court of Circuit, Reg 1, s 6, 1811.

²⁰² The punishment for a single offence of dacoity unaccompanied by homicide, personal injury or other aggravating circumstances was fourteen years imprisonment with hard labour, but if convicted of a repetition of the offence the sentence was imprisonment for life, or transportation for life, Reg 53, s 4, cl 4, 1803.

²⁰³ The outlining of such professions is a fascinating index of certain preoccupations of colonial justice, the control of coinage and the bullion market, the policing of the salt and opium monopoly and the weight assigned to official documents in the proof of claims. Cf. J. Styles, 'Our traitorous moneymakers: the Yorkshire coiners and the law, 1760–83', in J. Brewer and J. Styles, *An ungovernable people*, 1980, for innovative work on similar themes.

had regularly used the provision for holding to security against those suspected of being professional or hereditary criminals. The thuggee campaign strengthened the position of officers who had pressed for stronger measures against the 'irreclaimable' offender. The punishment prescribed by Act XXX of 1836 for belonging to a gang of thugs was the *eterno* confinement for life.

The general charge of belonging to a thug gang was easier to establish than the specific charge of murder. A case could be constructed on the basis of approvers' depositions, provided the judge could be reassured of precautions against collusion. Act XXX of 1836 also defined a category of criminals who could be punished by the paramount power, irrespective of whether he was a subject of the Company or of some Indian state and of where the crime had been committed.²⁰⁴ Legally, this smoothed the way for the Thuggee Department to arrange for the trial at whichever court was most convenient for the prosecution, whether for reasons of gathering evidence or on other grounds.²⁰⁵ Act XXX of 1836 and Act XXIV of 1843 — which extended the provisions of the Thuggee Act to 'professional dacoits' — afforded a security net to convict the prisoner who might escape a specific charge of murder by thuggee, or gang robbery.²⁰⁶ Suspected thugs were usually committed on both counts. Moreover, as Sleeman reminded his officers, Regulation 8 of 1818 was still at hand. If the officer was morally satisfied that the prisoner belonged to a gang of thugs but there was not enough evidence to commit him then it was his duty to confine him by demanding security.²⁰⁷

²⁰⁴ By Act XVIII of 1843 the Company also assumed the right to take over 'persons sentenced to imprisonment or transportation for . . . Thuggee, Dacoity, or . . . belonging to any gang of Thugs or Dacoits, within the Territories of any Native Prince or State in alliance with the said Company.' The justification was that these gangs committed offences in British territory as well as in the princely states, and that British jails would ensure close custody.

²⁰⁵ Assistant General Superintendents for the suppression of thuggee could commit prisoners to trial in the regulation districts under their surveillance. Act XIX of 1837 further clarified the position; 'any persons charged with murder by Thuggee, or with the offence of having belonged to a gang of thugs . . . may be committed by any Magistrate or Joint Magistrate within the Territories of the East India Company, for trial before any Criminal Court, competent to try such person on such charge'.

²⁰⁶ Cf. WHS to J.G. Lumsden, Secy, Jud. Dept, Bombay, 1 November 1850, Home, T&D, List 1, Cons B.2, p. 10, NAI.

²⁰⁷ WHS to Lt. J. Sleeman, 19 April 1838, Home, T&D, Cons G.5, September 1836–February 1839, NAI.

If thuggee was not defined in Act XXX of 1836, the target of Act XXIV of 1843, the professional dacoit, was even more opaque. The preamble explained that the act was intended to provide more stringent measures for the conviction of professional dacoits, those who belonged 'to certain tribes, systematically employed in carrying out their lawless pursuits in different parts of the country'. But the actual offence was defined more restrictively and without reference to the term *tribe*; it covered those 'proved to have belonged . . . to any gang of Dacoits.' A few years later the legislation on criminal communities was extended further. Act XI of 1848 prescribed seven years imprisonment for belonging 'to any wandering gang of persons, associated for the purposes of theft or robbery, not being a gang of thugs or Dacoits'.

The imprecise definition of the criminal community, and the increasing range of such targeted collectivities — thug gang, dacoit tribe, wandering gang — meant the generation of an expanding and fluid space for prosecutorial licence right within the legal framework. Yet, in a sense, these legislative devices, and all the knowledge so voluminously generated by the Thuggee and Dacoity Department, actually disguised an inability to acquire information which could bring the specific offence home to the offender. Conviction under these new acts ultimately depended on a negotiation between the prosecution and the judge about where the line between the casual offender and the supposedly professional hereditary criminal was to be drawn. A judge unwilling to convict a prisoner on the capital charge of murder solely on the basis of approvers' testimony, might be more amenable to sentencing him on the general charge of belonging to a thug gang.

The definition of this new substantive offence therefore smoothed the path for prosecution. But the government also made an effort to maintain the formal coherence of rule of law in the face of various suggestions that the crime of thuggee required a different standard of evidence in the regulation courts. Instead, Macaulay made one of his brilliant legislative interventions in the form of Act XIX of 1837; at one stroke the act sorted out of the many legal problems arising in the trial of thuggee cases while making the point that a dual standard of evidence would not be introduced.

The background to this act lay in the vestiges of the Islamic law of evidence, which refused to consider the evidence of persons convicted of a heinous crime as 'worthy of credit'. Hitherto, this

impediment was negotiated by offering a pardon to the accomplice who would turn approver. But the sustained rhetoric about the irreclaimable character of the thug made this pardon problematic. Could such an irreclaimable criminal be let loose on society again? One solution had been to take the approver into service and to keep him under surveillance. The other was to keep him under confinement by requiring him to provide security for good behaviour. However, there was a sense of legal irregularity about keeping the approver as 'prisoner at large' and working for the Thuggee Department, without actually passing sentence on him. It was this anomaly which provided the context for Act XIX of 1837. H. Shakespear, Law Commission member, outlined the aims of the proposed Act:

The object of the Act, is to get the benefit of the approver's information and evidence without holding out to him a full pardon according to the usual practice in such cases, and to secure the custody of his person if not for life at all events until he be set at large with safety to society.²⁰⁸

Macaulay's opinion was that it was better to formulate this as a universal law which stated that a convicted man was not incompetent to be a witness:

I am unwilling to pass a law which would seem to imply that we are disposed to put up with worse evidence in cases of thuggee than we think necessary in other cases. I am not sure that we have not gone a little too far in this direction already.²⁰⁹

Act XIX of 1837

laid down that no person shall, by reason of any conviction for any offence whatever, be incompetent to be a witness in any stage of any cause, Civil or Criminal, before any Court in the Territories of the East India Company.

A legal standard of evidence would have made it very difficult to incorporate the changes generated by the thuggee campaign into the legal framework of the regulation provinces. Act XIX of 1837

was proposed by H. Shakespear, 20 April 1837, on a draft Act submitted by the Madras Government for the trial and evidence of thugs. Leg Dept, 19 June 1837, Law Progs, May-June 1837, p. 370, NAI.

²⁰⁹ Minute by T.B. Macaulay, 5 June 1837, Leg Dept, 19 January 1837, Law Progs, May-June 1837, pp. 374-5, NAI.

only made the evidence of a convicted offender admissible in a court of law. It did not commit the judge to finding the approver's testimony of sufficient credibility or weight to convict the accused. Therefore, in cases tried in the Sessions courts it was up to the Thuggee Department or other committing authority to marshal evidence in such a way as to convince the judge of the sufficiency of proof. Throughout its career the Thuggee and Dacoity Department had to sustain a rhetoric about the reliability of its system for preventing collusion between approvers and checking their evidence. This occasionally led to wrangles between the Department and some judges who were accused of mistrusting approvers' evidence.²¹⁰

Act XIX of 1837 also strengthened the prosecution's hands in its negotiations with the approver. In instructions accompanying the act the government stressed that the thug approver was not to be promised an entire pardon, but only exemption from capital punishment and transportation, and some indulgences in confinement.

His Lordship in Council has before him such strong proofs that offenders of this class are irreclaimable that he cannot consent to let any of them loose on Society, however long the period of their confinement . . . however unexceptionable their demeanour . . . whatever the value of the information . . .²¹¹

The thug approver was to be told that, if he pleaded guilty to the 'minor' (!) offence of belonging to a thug gang, he would not be put on trial for any capital crime he might have committed.²¹²

²¹⁰ For instance, in 1850, there was a tussle between the thuggee department and the judges of the Bombay Presidency for their alleged distrust of approver's testimony. The Sessions Judge of Dharwar said that where the evidence was only that of convicted approvers he had to exercise the same caution in thuggee cases as in an ordinary case of gang robbery. Cf. Home, 1850, T&D, Cons B.2, No. 24, NAI; SJ, Dharwar, to Regr, Sadar Faujdari Adalat, Bombay, 15 May 1851, Home, 1854, T&D, Cons B.1, No. 6, NAI. Cf. also Home, 1859, T&D, Cons B.2, No. 27, NAI for a long wrangle between Home, Magt Etawah, and Major C. Hervey, Offg GS, on the reliability of approver's evidence as presented by the T&D Department.

²¹¹ Instructions with reference to Acts XVIII and XIX of 1837 from GG in C, Leg Dept, 19 June 1837, No. 16, Law progs, May-June 1837, NAI. 'Nothing short of a sentence pronounced by a Court of Justice and recorded on the Proceedings of that Court can be sufficient ground for detaining any person in perpetual imprisonment.' Ibid.

²¹² 'His conviction will under such circumstances be a matter of course.'

Given the high rate of conviction in prosecutions by the thuggee agency, the prisoner might well prefer to turn approver by pleading guilty to the charge of belonging to a thug gang than risk a trial without negotiation.²¹³ In 1838 a general offer of pardon to all thugs above the river Narbada was proclaimed on the same terms, that those who surrendered would only be committed on the general charge of belonging to a thug gang.²¹⁴ So the legal path to turning approver and negotiating surrender reaffirmed the presentation of thuggee as a criminal system.

The Extirpation of Thuggee and the Issue of Reclamation

Sleeman had always known how to buttress his demands for additional posts and police detachments with claims to past success and promises of swift success to follow.²¹⁵ In 1838 dacoity operations were added to the Thuggee Department and, by 1839 Sleeman was maintaining that the old thug gangs had dispersed and that thuggee as an organized system had been destroyed.²¹⁶ However Sleeman's claims may also have sprung from his evaluation of future strategies for policing suspect communities. In the first place the prosecution of various mendicant bands and peripatetic communities on the charge of practising thuggee was proving very difficult and causing serious embarrassment to the Department. Sleeman began to consider a range of other more flexible strategies for policing such communities. The second issue was that of the extent to which the government was to

It will leave him a competent witness. And he will be detained for life in confinement under an authority which can never be questioned and in a strictly regular manner.' Ibid.

²¹³ Cf. *Ramaseena*, pp. 38–9, table showing number of acquittals to commitments. Also figures of acquittals to commitments given by J. Hutton, *A popular account of the thug and dacoit*, 1857, in J.L. Sleeman, *Thug or a million murders*, 1933, p. 238.

²¹⁴ WHS to H. Torrins, Deputy Secy, 20 December 1838, letter No. 2259, Home, T&D, Cons G.9, July 1838–April 1839, NAI.

²¹⁵ Cf. WHS to W.H. Macnaghten, 8 September 1836, Home, T&D, G.4, September 1836–March 1838, pp. 30–1, NAI.

²¹⁶ WHS to H. Torrins, Deputy Secy, 20 December 1838, Home, T&D, Cons G.9, July 1838–April 1839, NAI. Also V.H. Sleeman, *Report on the depredations committed by the thug gangs*, 1840, introduction, p. xix. In July 1840 the government informed the Court of Directors that as organized associations thug bands had been broken up.

commit itself to isolating criminal communities and reclaiming them for a settled way of life.

The apparent success with which the Thuggee Department had used approvers' testimony to convict gangs operating in Central India had encouraged thuggee assistants to sweep up various bands of religious mendicants in the belief that they too would be found guilty of systematic highway murder. Reports were sent in about the discovery of Tin Nami thugs,²¹⁷ Gosain and Bairagi thugs,²¹⁸ Jogi, Kan Phuttie and Thorie thugs,²¹⁹ and Panda Brahmin thugs of Cuttack.²²⁰ Sleeman responded enthusiastically. 'I had begun to despair', he wrote, 'of ever being able to lift the veil from their crimes.'²²¹ Now, in February 1838, he reported confidently that he had full proof that Gosains and Bairagis and other religious mendicants were 'assassins by profession'.²²²

A couple of months later, however, he had to retreat from this position, after his assistants failed to substantiate charges of thuggee against certain parties of religious mendicants, Thoris and Jogis, whom they had apprehended. In one case the local population clashed with the arresting party and rescued some Jogis.²²³ Sleeman quickly cautioned Captain Malcolm from proceeding against the Bairagis in the Hyderabad territory, saying they did not clearly come within the jurisdiction of the department and 'if so included they will multiply our difficulties to

²¹⁷ Reynolds, Offg GS, to T.H. Baber, Political agent, Dharwar, 31-December 1836, Home, T&D, December 1836–May 1837, NAI.

²¹⁸ WHS to Lt. Birch, 27 December 1837, Home, T&D, G, September 1836–March 1838, NAI and W.H. Sleeman to Lt. Burrows, Asst GS, Dharwar, 27 March 1838, Home, T&D, Cons G.5, September 1836–February 1839, NAI.

²¹⁹ WHS to Lt. Burrows, 17 December 1837, Home, T&D, G.4, September 1836–March 1838, p. 83, NAI.

²²⁰ Capt. J. Vallancy to WHS, 14 October 1839, WHS to T.H. Maddock, Secy, Pol Dept, 26 November 1839, Foreign Pol, 22 January 1840, No. 78, pp. 408–10, NAI.

²²¹ WHS to W.H. Macnaghten, Secy, GOI, 3 February 1838, Home, T&D, Cons G.5, September 1836–February 1839, NAI.

²²² Ibid.

²²³ For details of this fiasco cf. WHS to Lt. Burrows, Asst GS, 27 March 1838, WHS to Capt P.A. Reynolds, 6 April 1838, Home, T&D, Cons G.5, September 1836–February 1839, NAI. WHS to Capt Reynolds, 18 July 1838, letter 1186, Home, T&D, Cons G.8, July 1838–April 1839, NAI. WHS to Lt. Lumley, 30 July 1838, letter 1242, ibid.

a fearful extent.²²⁴ Reynolds was advised to release the Jogis arrested at Dharwar. Here the approver's evidence was so suspect, wrote Sleeman, that had the papers been sent to Government 'it would have created a feeling of distrust in all that we do which nothing could ever have removed'.²²⁵ Although Jogis and other religious mendicants, he maintained, did occasionally murder people to rob them, there was little chance of getting judicial proof of their guilt upon a scale that would justify their arrests in large numbers.²²⁶ Birch at Bombay was advised to confine his enquiries 'more exclusively to the old and well-known thug fraternities',²²⁷ Jogis should be left to the local courts.²²⁸

Sleeman continued to press for the more stringent policing of religious mendicants and other peripatetic communities insisting that some of them did engage in thuggee, and that the population should be made aware of the 'atrocious characters' of Jogis and other such bands.²²⁹ Among the measures he suggested was the posting of police among large bodies of Banjaras,²³⁰ the compulsory registration of all religious disciples and a stringent Vagrancy

²²⁴ WHS to Captain Malcolm, Extra Asst GS, 31 March 1838, Home T&D, Cons G.5, September 1836–February 1839, NAI.

²²⁵ WHS to Capt. P.A. Reynolds, 6 April 1838, *ibid.*, pp. 112–14, NAI.

²²⁶ WHS to Capt. Malcolm, 22 August 1838, letter 1432, Home, T&D, Cons G.8, July 1838–April 1839, NAI. Comparing the approvers from these gangs to those from the 'old hereditary Thug associations in the Dukhun and Hindustan', Sleeman said that they had failed to give convincing evidence. *Ibid.*

²²⁷ WHS to Lt. W.G. Birch, Asst GS, Bombay, 5 July 1838, Home T&D, Cons G.5, September 1836–February 1839, p. 26, NAI. Also WHS to Capt. Burrows, 18 January 1839, *ibid.*, p. 337, NAI.

²²⁸ WHS to Lt. Birch, 4 April 1839, letter 2747, Home, T&D, Cons G.8, July 1838–April 1839, NAI. Similarly, in the case of the wandering Banjaras Sleeman said that though they occasionally murdered travellers, only those should be apprehended who were implicated in a particular crime. WHS to Capt Reynolds, 21 January 1839, Home, T&D, *ibid.* Cf. also WHS to Offg Secy, GOI, 30 September 1840, saying that it was better to leave Jogi vagrants and gangs of poisoners to the local Magistrate. Home Dept, Cons G.11, April 1840–March 1841, NAI.

²²⁹ Captain Malcolm was urged to take any opportunity to convict some of the Jogis who had been arrested in the local courts so that people would become aware of their 'atrocious characters'. WHS to Capt. Malcolm, 22 August 1838, Home, T&D, G.8, July 1838–April 1839, NAI.

²³⁰ If a few Banjaras could be convicted for thuggee, he wrote, then the Magistrates could be persuaded to this. WHS to Captain Reynolds, 21 January 1839, *ibid.*

Act.²³¹ Thuggee officers now restricted themselves to the contention that some members of these bands engaged in thuggee in a casual way, even if all were not thugs by profession.

But the problem was that in their prosecution strategy the idea of casual thuggee had been denied by officers of the thuggee agency.²³² If the existence of casual thuggee was accepted, then that aggressive shortening of procedure by which a man was convicted for being a member of a thug gang instead of on a specific offence was hard to justify.²³³ The failure of the effort to establish thuggee against religious mendicants and certain peripatetic communities may have encouraged Sleeman to preserve the reputation of the department by claiming that thuggee 'as a system' had been extirpated.²³⁴

However the Thuggee Act still provided a useful short-cut in tackling other crimes which seemed to be the preserve of organized gangs. It was used to deal with the traffic in children, a phenomenon which had swollen in the wake of the drought which ravaged the Upper Doab, Delhi region and Rajputana in the late 1830s,²³⁵ and

²³¹ *Rambles and recollections*, pp. 592–3, n.2.

²³² 'It must be borne in mind', wrote F.C. Smith, 'that a Thug cannot possibly be guilty of a Solitary crime, but of numbers, because Thuggee is a profession for life and not a casual mode (of) obtaining a livelihood'. F.C. Smith, *nd*, Leg Dept, 19 June 1837, No. 10, Law Progs, May–June 1837, NAI. Cf. also WHS to W.H. Macnaghten, 8 September 1836, Home, T&D, G.4, September 1836–March 1838, pp. 15–20, NAI.

²³³ In 1839, asked about prisoners who might be guilty of thuggee on a single occasion, the Officiating General Superintendent, Reynolds, said he was 'rather sceptical on the subject of casual Thuggee on the part of hereditary members of this class of criminals'. Reynolds to Lt. W.T. Briggs, 20 December 1836, Home, T&D, Cons G.6, December 1836–May 1837, NAI. And yet a few days later he was writing that bird-catchers and bear and monkey entertainers 'are in the habit of practising Thuggee on a small scale'. Reynolds to T.H. Baber, Pol. Agent, Dharwar, 31 December 1836, Letter 1490, *ibid.*

²³⁴ WHS to H. Torrins, Deputy Secy, 20 December 1838, Home T&D, Cons G.9, July 1838–April 1839, NAI. Writing to Paton on 26 January 1840, Sleeman claimed that though many Jumaldhee Thugs were at large, they did not anywhere carry on their trade of murder; *Report on Budbuk decoits*, p. 202. Also, *Report on the depredations committed by thug gangs*, 1840, p. xix.

²³⁵ Sleeman coined a word to describe what he claimed was a new type of thuggee, *Megpunnaism*, the murder of parents to sell their children as slaves. He asked for a special judge to try these cases in the Upper Doab, but government refused on the grounds that the crime differed from thuggee only in the species of gain. Offg Secy, GOI, to WHS, 17 January 1839, Home, 1839, T&D, Cons B.2, No. 16, NAI.

parties of gamblers who operated on thoroughfares also came under its purview.²³⁶ Whether the crime of poisoning travellers to rob them should be prosecuted under the Thuggee Act remained a point of debate. The setback which the department had received in prosecuting various 'suspicious' bands on charges of thuggee led Sleeman to suggest that cases of poisoning be left to the local Magistrate.²³⁷ But in the course of the pacification drives undertaken by the Thuggee and Dacoity Department on the border areas of Awadh the Act was applied to prosecute the Pasis, armed watchmen, who were believed to be a class of 'poisoners by profession'.²³⁸

Such questions about the scope of the Thuggee Act made it necessary to spell out what thuggee was.²³⁹ The definition outlined in Act III of 1848 admitted that poisoning could be a species of thuggee even if it did not always lead to death,²⁴⁰ and included the crime of murder for 'child-stealing'. But whether poisoning was always a 'professional' crime, and therefore one over which the Thuggee Department could exercise jurisdiction and admit approvers, remained a point of controversy.²⁴¹

²³⁶ Cf. J.L. Sleeman, *Thug or a million murders*, pp. 194–6. The thuggee provision was also used to deal with the law and order problems created by mercenaries displaced by the annexation of Punjab. Cf. G. Campbell, *Modern India*, 1852, pp. 517–19.

²³⁷ Sleeman argued that because poisoners operated in smaller bands, it was difficult to compare the evidence of approvers, or to induce prisoners to turn approver on the promise of that limited pardon held out to thug approvers. Cf. WHS to Offg Secy to GOI, 30 September 1840, Home, T&D, G.11, April 1840–March 1841, NAI. Also *Rambles and recollections*, 1844.

²³⁸ WHS to H.M. Elliot, Secy, GOI, Foreign Dept, No. 24, 24 June 1847, NAI. But the term 'thug' had to be redefined to make it applicable. Cf. Act III of 1848.

²³⁹ The preamble to Act III of 1848 stated that doubts had arisen as to the meaning of the words 'Thug', 'Thuggee' and 'Murder by Thuggee' when used in Acts. In the draft penal code of 1837 Macaulay had made an effort to define a thug: 'Whoever belongs, or has at any time belonged to any gang of persons associated for the purpose of gaining a livelihood by inveigling and murdering travellers in order to take the property of such travellers, is designated a thug, DPC, cl 311. The definition did not really resolve the issue of how the line between the 'casual' gang robber and the one structured to 'gaining a livelihood' was to be determined.

²⁴⁰ Act III of 1848 defined the means used for thuggee as those intended or known to be likely to cause death. (emphasis added). Cf. *Report on Budhuk decoits*, p. 3.

²⁴¹ Cf. Col. C. Hervey, *Report on the crime of thuggee by means of poison*,

Act XXX of 1836 had therefore set a very important precedent for the formulation of legal provisions to try 'criminal communities'. But its application to a particular group was determined by a variety of factors, and had to be weighed against the advantage of other forms of policing. In the case of religious mendicants, the swoop on such bands had aroused a measure of resistance from society which prompted a re-evaluation of strategy. It is for such reasons that a community classified under one form of criminal profession could be placed under another category in a different political and institutional context.²⁴² The penal regime envisaged for criminal communities also shifted with changing economic and political preoccupations. In the 1770s Warren Hastings had proposed that dacoit families be enslaved; in the 1830s and 1840s there was an interest in colonizing wasteland, and in applying industrial rhythms to penal work regimes; and from the late nineteenth century punishment was linked to finding labour for mines, quarries and factories.²⁴³

Sleeman's effort to mark the conclusion of a certain phase of the campaign was also related to the question of whether the policing of criminal communities was to extend to schemes to reform and reclaim them. This issue also allows us to re-examine the view that the thuggee campaign was a victory for the Anglicist policy of intervention as against the school which favoured the 'preservation of Indian customs'.²⁴⁴ The thuggee campaign certainly used the rhetoric of authoritarian reform which characterized the 1830s. But there had been little, if any, apprehension among officials that the drive against thuggee would be interpreted as an intervention in the religion and customs of the Indian people.²⁴⁵ The point of concern in official correspondence was

1868, p. 3 and *Some records of crime*, vol. 1, 1892, pp. 22–3, where he presses for the cognizance of 'Thuggee by means of poison'.

²⁴² See above, fn. 30.

²⁴³ Cf. M. Radhakrishna, 'The Criminal Tribes Act in Madras Presidency', pp. 283–7, for the latter.

²⁴⁴ S.N. Gordon, 'Sword and scarf', p. 410; G. Bruce, *The stranglers*, pp. 3, 27, 42; B. Hjejle, 'The social policy of the East India Company', D.Phil, Oxford, 1958.

²⁴⁵ Even James Paton, a thuggee officer of ardent Evangelical views, had acknowledged that there were no 'direct or express' religious or superstitious motives for the toleration which Indians seemed to extend to known thugs in their midst. J. Paton, BM Addl Mss 41,300, pp. 173–4.

about enmeshing the Company in the internal affairs of the Indian states and about putting too much power in the hands of their own police. However, the 'revelations' about thuggee were drawn into the debate about the extent to which the government ought to intervene to change social norms. For Evangelicals like Trevelyan, thuggee provided damning evidence against Hinduism and illustrated the moral depravity of a society which could tolerate such a crime. The 'application of force', he concluded, 'can only be a temporary and partial remedy for Thuggee . . .'.²⁴⁶ What was needed, he stressed, was regeneration through education.²⁴⁷ But the significant point here is that Sleeman, held to be the architect of the campaign, did in fact think that policing and prosecution under special laws and the maintenance of the Thuggee Department was sufficient to force such communities to disperse and turn to other means of livelihood.

There are indications that by 1839 Sleeman wanted to call a halt to the accumulation of thug families around Jabbalpur. Earlier the Thuggee Department had argued that male children arrested with thugs or those who came to join their approver fathers at Lucknow and Jabbalpur ought to be kept in confinement because they were contaminated. Now Sleeman used a different tone, advising the Officiating General Superintendent, Reynolds, that there was no need to give the thug prisoners money in addition to rations.

To give them more would tend to bring around the Jail all their women and children who might otherwise establish themselves with men who would bring them up with honest industry. Now the gangs have been so much broken up I do not think there is any danger of the young boys taking to Thuggee if left to shift for themselves.²⁴⁸

This suggests that Sleeman was not very keen to expand the number of thug families at Jabbalpur. These had been put to

²⁴⁶ C.E. Trevelyan, 'The thugs or secret murderers of India', *The Edinburgh review*, vol. LXIX, 1837, pp. 357-95.

²⁴⁷ Ibid. James Paton also suggested that the children of thugs be drawn from their villages so as to 'engraft' upon them 'the delightful fruits' of Christian instruction and virtue'. J. Paton to WHS, 5 January 1838, Home, T&D, Cons B.2, No. 10, NAI.

²⁴⁸ WHS to Capt Reynolds, 22 February 1839, letter 2569, Home, T&D, Cons G.8, July 1838-April 1839, NAI. Cf. also WHS to Mills, 23 February 1839, letter 2574, *ibid.*, advocating a similar policy.

work with thug approvers to manufacture tents, carpets and other goods on a profit-sharing basis, a venture which was being hailed as a unique experiment in reform and reclamation.²⁴⁹ Sleeman's argument was that as the 'system' had been destroyed and the Department would prevent its re-emergence, members of thug families could be cast back into society without fear that they would spread the contagion.²⁵⁰ This retreat from an undertaking to isolate entire criminal communities from society and to reclaim them is even more marked in Sleeman's position on dacoit tribes. He wanted the provisions of the Thuggee Act to be extended to the dacoit tribes, i.e. the facility of convicting them on a general charge of belonging to a dacoit tribe, but arrests were to be restricted to the leaders of dacoit gangs. He argued that this would be enough to break them up.²⁵¹ The one exception he made was in the case of the Badhaks,²⁵² probably because the campaign against them was tied to the Company's political and fiscal relationship with Awadh.²⁵³ However, here again Sleeman opposed the programme advocated by James Paton, Assistant Resident, Lucknow, and some other officials, of settling the Badhaks on wasteland as agriculturalists. He favoured the more restrictive policy of arresting and prosecuting those suspected of

²⁴⁹ Sleeman's attitude was very different from that of McLeod, a thuggee officer who wanted the Jabbalpur experiment to be expanded: 'It may be argued that it is only the Peculiarity of the System followed for the suppression of Thuggee which has brought their families within our Controls. But the same controls may be extended to every class of persons matured in crime.' McLeod's police report on the SNT, paras 32-3, April 1841, Foreign, Pol. (A), 1841, 26 July 1841, No. 74, NAI.

²⁵⁰ Under pressure of pursuit, wrote Sleeman in his 1840 report, the sons of thugs would take to honest industry. *Report on the depredations committed by thug gangs*, p. xi.

²⁵¹ WHS to L.H. Maddock, Secy, 26 February 1839, Home, T&D, Cons G.8, July 1838-April 1839, NAI. The principal publicist for the thuggee department therefore differed from enthusiasts of 'reform' who wanted to expand the campaign into a scheme to separate criminal communities from society and transform them into productive law abiding subjects. This would modify Stewart Gordon's argument that 'Sleeman's eventual success in persuading the Government of India is a gauge of the triumph of the Evangelical crusading philosophy of British Indian administration over the "preservation of Indian customs"', 'Scurf and Sword'.

²⁵² WHS to L.H. Maddock, Secy, 13 March 1839, *ibid.*

²⁵³ Cf. S. Nigam, 'A social history of a colonial stereotype'.

belonging to a dacoit gang, arguing that this of itself would force them to blend with law-abiding society.²⁵⁴

In institutional terms thuggee and dacoity operations anticipated the reform model for a centralized police bureaucracy, though it took the convulsions of the 1857 rebellion to really reorganize civilian policing. However the small number of thuggee superintendents and the limited resources they were allowed made the enterprise a very limited venture into an all-India framework of policing and surveillance. But even this fact was assimilated to the mythic account of the campaign. 'A few Englishmen,' wrote J.W. Kaye in awe, '... have purged India of this great pollution.'²⁵⁵

²⁵⁴ WHS to Hamilton, Secy, Govt of NWP, 29 April 1843, COG, Basta 18, vol. 131, Gorakhpur, Judl, RAA. WHS to H.E. Tucker, Offg Magt, Gorakhpur, 27 May 1845, Gorakhpur Collectorate, Pre-Mutiny, letters received from the GS, T&D, 1844-56, Basta 13, vol. 97, RAA. Cf. J. Paton, Asst Resident, Lucknow for an argument in favour of locating Budhaks on wasteland. J. Paton, Addnl Ms 41300, pp. 408, 417-20. Memo by J. Paton, for Colonel Caulfield, Actg Resident, Lucknow, 25 January 1840, Foreign Dept, A. Pol., 9 March 1840, No. 122, NAI.

²⁵⁵ J.W. Kaye, *The administration of the East India Company*, p. 376.

Chapter Six

Penal Reform and Public Authority

In the previous chapter I pointed out that the mission to eradicate thuggee appealed to various sections of British reform opinion, but schemes to reclaim entire criminal communities raised sobering questions about infrastructural commitment. The issue of rehabilitation was part of a wider concern to orient the terms of punishment and correction to a certain agenda of reform. Here I examine a certain cluster of changes introduced to the Company's penal regime in the 1830s and 1840s, relating them to a broader effort to reconstruct the image of British public authority in India.

Recent historical analyses have been sceptical about the 1830s as a decade of reform or modernization in the colony. In these accounts reform is treated as a rhetorical trope largely intended for British public opinion in the context of the Charter debates, and the pragmatic goal of cost-cutting is given precedence over the influence of Evangelical and Utilitarian ideology. Stokes, who had once dwelt on the influence of an authoritarian brand of Utilitarianism on official policy,¹ subsequently argued that the brute facts of public order and fiscal retrenchment opened the way to utilitarian reform.² C.A. Bayly highlights the other consequence of cost-cutting, the constraints it imposed on ambitious projects for administrative revamping.³ The ebb of reforming zeal is also attributed to the resumption of frontier wars from 1838, and to the intractable nature of Indian society.⁴

All these cautionary warnings against attributing too much to

¹ E. Stokes, *The English utilitarians in India*, 1959, pp. vii-viii.

² E. Stokes, 'Bureaucracy and ideology', *Transactions of the royal historical society*, 5th series, xxx (1980), pp. 131-56.

³ C.A. Bayly, 'The age of hiatus', in C.H. Philips and M.D. Wainwright (eds), *Indian society and the beginnings of modernisation c. 1830-1850*, 1976, pp. 84, 101; *The new cambridge history of India*, II.1, 1988, pp. 120-1.

⁴ J. Brown, *Modern India*, 1984, p. 71.

reform ideology could be illustrated with a wealth of examples from the correspondence on penal policy. One could cite the very qualified terms in which the government received the recommendations of the 1838 Committee for Prison Discipline:

Every reform of prison discipline is, almost of necessity, attended at the outset with extraordinary expense. . . . For food, for labour, and for consort, there are habits and an inveteracy of prejudice and of feeling bearing upon health, and almost upon life, opposing difficulties to the just management of prisons such as are not elsewhere encountered. . . .⁵

Government's reluctance to finance extensive alterations to jails or to build central penitentiaries meant that the typical district prison remained an overcrowded, ramshackle construction, with little space for indoor labour and only the crudest classification of prisoners.⁶ The fiscal pressure to keep convict work gangs on the public roads exerted a strong undertow against schemes favouring the disciplinary advantages of indoor labour. Ironically, 'reform' in this direction was undercut by a quest for 'improvement' in another sphere: that of associating British paramountcy with public works on an imperial scale.⁷

It is far easier in fact to list the various constraints on penal reform in the colony, than to explain why any changes were introduced at all. Nevertheless, some changes were, after all, pushed through, and I will use these to explore certain shifts in the cultural components of colonial rule of law. Even when a particular punishment was retained, the arguments by which it was justified, or the rules regulating it, could change. I examine these developments in the context of two tendencies: the effort to regulate public spectacles of corporal pain and social ignominy more closely because of a greater uncertainty about society's reactions to them; and the complementary effort to extend the penal imperative over aspects of the jail regime usually left to the prisoner's own devices. The most significant change in the texture of the prisoner's daily life was

⁵ Resoln of GOI, Leg Dept, 8 October 1838, *Report of the committee on prison discipline* (CPD), Calcutta, 1838, p. 3.

⁶ Cf. correspondence on jails in K.K. Datta (ed.), *Selections Patna correspondence*, 1954, pp. 242-62.

⁷ Bentinck sent a road map to Lord Ellenborough describing it as 'one great index to the state of improvement.' Bentinck to Ellenborough, 5 November 1829, *CLWCB*, 1, p. 333.

the replacement of a daily money allowance for food by rations and then by cooked food in messes. Another development was the more determined effort to provide indoor labour for certain categories of prisoners.

In the earlier phase of Company rule the public infliction of pain and ignominy, through such rituals as the public execution, gibbeting, *tashir*, public flogging and labour in fetters on the roads, was accepted as a crucial component of deterrence.⁸ However, the public nature of such punishments had also forced the government to take account of rank and status in the infliction of punishment. Magistrates and judges had discretionary powers to modify punishments of public infamy for men of 'caste and rank'.⁹ In other words, colonial law had freely explored the terrain of social sensibilities both for terror as well as for suasion. From the 1820s, however, some regulations indicate a shift towards a more discriminating use of forms of public punishment such as flogging and *tashir*, removing these for certain offences altogether. There was also an exchange of views in official correspondence about removing outdoor labour for offences such as 'breach of peace' which were not supposed to evoke great censure in society. Colonial justice was to be made more acceptable to the 'respectable orders' often hauled up for this offence. The 'lower orders' were supposed to display a proclivity for crimes of greater 'moral turpitude' such as theft and robbery.

From the 1830s and 1840s the correspondence on penal policy indicates a greater questioning of the advantages of this parley between the punitive claims of the state and the social identity of the offender. Officials tended to assess the negotiatory clutter around caste and rank as something which compromised legal authority. These debates indicate a stronger effort to order the offender's identity in a more uniform and standardized way as the object of punishment. The stricter separation of the offender within the jail regime from all the rhythms of the social and the familiar seemed to be the best way of bringing this about.

⁸ *Tashir*: An Indian version of the pillory in which the offender's face was blackened, he was seated backwards on a donkey and paraded round the town.

⁹ Cf. CONA 6 April 1796, in J. Carrau, *Circular orders*, Calcutta, 1855. In addition, the magistrate's power to inflict corporal punishment for neglect of police duty was expressly restricted to those who were 'fit objects' for such punishment. Reg 3, s 6, 1812 and Reg 14, s 9, 1816.

Objections to certain forms of public punishment were sometimes organized within a utilitarian framework. The argument was that the suffering inflicted by spectacles of public punishment was very unequal, because its degree varied with the rank or sensibility of the offender. This unpredictability was enhanced by the judicial discretion which regulated the infliction of such punishments.¹⁰ The case against such punishments was also argued from the humanitarian position. Spectacles of 'cruel and unnecessary suffering' associated the law with torture or vindictiveness, and thereby evoked the bond of human sympathy between the offender and society. A humane regime of punishment would enhance the legitimacy of the legal system instead of making the offender an object of pity.¹¹ Both from the utilitarian and humanitarian perspective, therefore, there was a heightened uncertainty about the responses evoked by rituals of public punishment.¹²

In an interesting foray into this theme, Anand Yang argues that there is little in the report of the Committee for Prison Discipline in India which speaks in the voice of humanitarianism or of reform and rehabilitation.¹³ He implies a contrast with penal reform in England, asserting that 'discipline and punishment

¹⁰ For instance Indian Law Commissioners to GG Auckland, 14 October 1837, arguing that judicial discretion in interpreting the law undermined its authority. *PP*, vol. 41, 1837-38, pp. 470-1; and *CPD*, paras 31-2.

¹¹ '[S]ince the sympathies of the depraved are with the criminal, to witness his toils may excite compassion rather than detestation of his crime or fear of its consequences.' Committee on Convict Labour (CCL) to Governor Bengal, 14 March 1837, Home Judl Cons, 27 March 1837, No. 2, NAI.

¹² In the Madras Presidency a judicial order of 3 May 1830 directed that the effect of every execution on the spectators and on the condemned man be recorded, to assess the effect of such examples. J.B. Pharoah, *The circular orders of the court of Foujdaree Udawlut*, 1805-46, Madras, 1847 (henceforth *COFA*), p. 138.

¹³ A. Yang, 'Disciplining "natives"', *South Asia*, x, 2 (December 1987), new series, pp. 29-45. I agree with Yang that the Committee discussed isolation, labour and discipline solely in terms of enhancing the severity of imprisonment. In England these strategies were also discussed as a means of awakening the conscience of the offender. Cf. J.M. Beattie's splendid book *Crime and the courts in England 1660-1800*, 1986, p. 575. However, in England too, ambitions about reforming the offender had begun to evaporate by mid-century. S. McConville, *A history of English prison administration*, vol. 1, 1750-1877, 1981, p. 262 and M.H. Tomlinson, 'Penal servitude; a system in evolution', in V. Bailey (ed.), *Policing and punishment in nineteenth century Britain*, 1981, p. 136.

under the British Raj were inextricably linked to the regime's strategies of power and rule.¹⁴ But the same proposition would hold good, in a general sort of way, for penal reform in the metropolis as well. After all, the thrust of revisionist writing on jail reform has been that, in a rapidly changing society, the discourse of humanity underwrote arguments for a more effective economy of power.¹⁵ I argue that the discourse of humanity did have a certain presence in discussions on colonial penal reform as well.¹⁶ 'Humanity' surfaces in discussions about the instruments of death or corporal pain, as officials searched for the supposed line between the pain necessary to the fulfillment of judicial sentence, and that which suggested 'cruel and unnecessary suffering'. Humanity sometimes entered discussions about convict labour; it was very prominent in the brief given to the 1836 committee to assess the situation of convict labour under military engineers.¹⁷ From the 1830s the collection of statistical data on jails was supposed to assist the formulation of uniform policies to improve discipline and economy. But this data was also expected to serve the interests of justice and humanity by revealing ways to control the incidence of sickness and mortality among prisoners. The report of the Committee for Prison Discipline, cast in the language of utilitarianism, did not raise the issue of humanity; but it contended that the first stage of prison reform, a regard for the natural wants of the prisoner, had already been accomplished in India. Here the issue of the prisoner's health seems to stand in for the theme of humanity. A special feature of the debates in penal strategy of this period was the equation between these two issues and the new significance of the medical specialist in policy-making.

When Hutchinson, Secretary of the Medical Board, criticized the Committee's report for assuming that the physical well-being of the prisoner was looked after, he was extending the authority

¹⁴ 'Disciplining "natives" '.

¹⁵ M. Ignatieff, *A just measure of pain*, London, 1978.

¹⁶ In his minute of 14 December 1835 on jail discipline and in the draft penal code Macaulay stressed the importance of 'such regulations as shall make imprisonment a terror to wrongdoers, and at the same time prevent it from being attended by any circumstances shocking to humanity'. Cf. C.D. Dharker, *Lord Macaulay's legislative minutes*, 1946.

¹⁷ CCL to Auckland, 14 March 1837, para 2, Home Judl Cr, 27 March 1837, No. 2, NAI. See below.

of the medical professional by invoking humanitarian concern.¹⁸ But the motivations and effects of the humanist discourse were complex. In one sense the medical officer was being called upon to suggest ways by which the prisoner could be kept alive, and, by implication, fit for work under the new strategies for enhancing jail severities. But the drives of health and of discipline were not always easily reconciled. The withdrawal of prisoner choice in the matter of food was justified on the grounds of health and better discipline. But medical intervention also hastened the realization that the substitute diet had to be varied and its quantity increased for labouring prisoners, and that the determination of a diet which was penal yet healthy was a complicated matter. Some officials implied that this intervention had diluted the disciplinary intent of cooked food altogether.¹⁹

Finally, there is one facet of the discourse of humanitarianism which is probably unique to the colonial context. It constituted an organizing theme within an endeavour to install British paramountcy as the source of norms and standards for just and benevolent rule. Bentinck's proclamation to abolish sati, and the humanitarian mission to rid India of thuggee, had both been outlined against the landscape of paramountcy. In the reform decade the Company also began to demand that the Indian states, and particularly the more dependant ones, accept the civilizational norms of the supreme power in abjuring 'cruel and barbaric' punishments such as mutilation.²⁰ Yet on the issue of capital punishment, as I pointed out earlier, the terrain of humanitarianism was not claimed so easily from the native states. With a note of puzzlement Emily Eden reported that Ranjit Singh seldom put anyone to death, using the punishment of amputation instead, 'but he isn't reckoned cruel'.²¹ Interestingly, Bentinck's 1834 regulation to abolish corporal punishment

implied that the paramount power had to distinguish its own penal practises more sharply from those of the native states to claim the moral high ground.²²

The European reform movement against cruel or arbitrary forms of punishment in eighteenth and nineteenth century Europe has been evaluated as a reworking of the premises of order and of the legitimacy of the judicial process in the context of rapid social change.²³ Apprehensions about crime in a mobile and urbanizing society convinced sections of the propertied classes that social order required new measures to restrain the poor.²⁴ In place of a paternalistic vision of order based on discretionary authority and the command of social deference, writes Ignatieff, the reformers insisted that social stability had to be founded on popular consent, and maintained by guilt at the thought of wrongdoing. This prompted a new approach to the conscience of the offender.²⁵ Legal and penal reform formed one strand in a complex set of institutional practises, for instance in education and religion, which held up a middle-class value system for the labouring classes.²⁶

But could the Company hope to address the conscience of its Indian subjects in this way? The Evangelicals argued that Hinduism instilled a wrong attitude to crime and the government must encourage an education which would inculcate the right moral values. Without this a sensibility supportive of judicial authority would not emerge, for the moral sense of Indians as it existed was far too depraved.²⁷ However, Government kept Christian proselytization

²² See below for preamble to Reg 2, 1834.

²³ M. Ignatieff, *A just measure of pain*, pp. 200–11; R. McGowan, 'The image of justice and reform of the criminal law in early nineteenth-century England', *Buffalo law review*, 32 (1982), pp. 89–125; J.M. Beattie, *Crime and the courts*.

²⁴ *Crime and the courts*, pp. 624–5, 629.

²⁵ *A just measure of pain*, pp. 210–11.

²⁶ M.J. Wiener, *Reconstructing the criminal*, 1990, pp. 53–5. Statisticians in early Victorian Britain argued for concerted change in the urban environment, in terms of health and education, to convert one class to the value system of another. M.J. Cullen, *The statistical movement in early Victorian Britain*, 1975, pp. 135–7.

²⁷ For instance, C.E. Trevelyan, 'The thugs; or secret murderers of India', *The Edinburgh review*, lxiv (1837), pp. 394–5. Rev. C.B. Leupolt, *Recollections of an Indian missionary*, 1856, pp. 37–45.

¹⁸ Cf. J. Hutchinson, *Observations on the general and medical management of Indian jails*, second edition, 1845, pp. i–vii, 9, 68.

¹⁹ Govt of Bengal to COD, 22 March 1845, Judl No. 5, para 4, WBSA. Cf. 'Prison discipline in India', *Calcutta review*, July–December 1846, pp. 473, 488, criticizing the 'luxurious mode' of feeding prisoners; also *Benares recorder*, 9 April 1847, microfilm, Centre for South Asian Studies, Cambridge.

²⁰ Foreign Dept, Pol. Cons, 12 December 1833, Nos 66–7 and 13 September 1841, Nos 44–6. Despatch from COD, 16 May 1838, India and Bengal despatches, E/4/758, pp. 489–90.

²¹ J. Dunbar (ed.), *Tigers, durbars and kings*, 1988, p. 125.

firmly out of the penal sphere.²⁸ Far more characteristic of the official attitude on penal policy was what Stokes characterizes as the authoritarian strand of utilitarianism.²⁹ The rigour and certainty of punishment had to be enhanced so that obedience to the law became a matter of rational calculation, even if as an external compulsion rather than as a moral transformation. An extract from the report of the Committee for Prison Discipline illustrates this more constrained view of the ability of a foreign government to remould moral sensibilities:

The morality of an Englishman is based so differently from that of an Indian, that there is little in common between the two that can be taken as a topic whereon to enlarge. But if, by the better attainment of the main end of punishment, we succeed in making an offender feel keenly that it is in his interest to offend no more, something will have been done towards the improvement of his character.³⁰

This does not mean, however, that official discussions on penal reform overlooked the question of social consent; a crucial consideration was the conciliation of the respectable sections of society.

There is another important contrast between the discussion on penal reform in the metropolis and in the colony. The exploration of strategies for enhancing the authority of the legal system in the colony does not seem to develop from an anxiety about a society in the throes of change, as was the case in England. For instance, official explanations for the pattern of criminal behaviour show a remarkable stability, though the proposed solutions changed. Crimes of honour and breach of peace were attributed to the upper classes, those of moral turpitude to the lower, and gang robbery to the so-called professional

or hereditary criminals.³¹ In their prescriptions for legal or police reform, officials did address the need to develop links with a class of enlightened Indians responsive to western education and commercial opportunity. This tendency is evident in gestures of consultation with 'enlightened native opinion' on the abolition of sati, the reform of the mofussil police in Bengal, the admission of Indians to higher office in the civil judiciary and the effort to use respectable natives as judicial assessors.³² But in assessing the social response to new legal measures, the government did not rely only on this public opinion in the making. It sought it from a society which it conceived of as still essentially a traditional one, to be approached by the usual reassurances regarding the maintenance of religion and rank order in society.³³

This anxiety about social consent influenced the form in which changes were introduced. In consequence the social identity of the offender was sometimes re-inscribed in measures originally intended to emphasize the primacy of rule of law. To cite one example, messing was introduced into the jails of the North Western Provinces and the Bengal Presidency as a means of enhancing prison discipline. But instead of constituting messes by the principle of a standard size, the magistrates began by drawing up lists of castes that could eat together. In drawing attention to this paradox, I do not intend to suggest that there was no change. This reification of the prisoner's caste identity was linked to an increase in the severity of jail discipline, and messing was resisted in a series of riots in the Bihar province in the 1840s.

³¹ Cf. for instance J. Thomason, *Magt Azamgarh*, CPD, Appendix 4, pp. 69–70. Macaulay argued that transportation was particularly suited to India because a large proportion of crime was committed by tribes who treated it as their calling with little consciousness of guilt. Crime therefore was not the product of 'a general depravity of character, such as is usually the crime of an English malefactor', and the break from ties of caste would remove the obstacle to an honest life. CPD, paras 213–14.

³² *Committee on the mofussil police*, Bengal, 1838, p. 1, para 2; Reg. 6, s. 2, 1832, on judicial assessors. See epilogue for further discussion on this theme.

³³ For instance, Bentinck argued his case for the safety of abolishing sati by claiming it would not affect the high caste soldier of the Bengal army. Its abolition, he explained, could not be left to the 'self-correction' of society because, 'though in Calcutta truth may be said to have made a considerable advance among the higher orders; yet in respect to the population at large, no change whatever has taken place . . . ' Minute on sati, 8 November 1829, CLWCB, 1, pp. 335–45.

²⁸ Cf. CPD, para 273. The Madras Faujdari Adalat ordered that at executions officials were 'not so to conduct themselves, as to convey . . . the impression that they are more intent upon the conversion of the criminal to Christianity than upon the due execution of the law'. COFA 10 December 1830, p. 143. Also F.J. Mouat, 'On prison statistics and discipline in Lower Bengal', *Journal of the statistical society of London (JSSL)*, vol. xxx, June 1862, pp. 175–218.

²⁹ 'It was India which most clearly exposed the paradox of Utilitarianism between the principle of liberty and the principle of authority. . . ' *The English utilitarians*, p. viii.

³⁰ CPD, para 277.

This conclusion leaves me with another question. What was the impetus then for any change at all? Cost-cutting and the related aspiration for a more efficient utilization of prison labour do provide important answers, but they are not the pre-eminent factor in every change. A more elusive line of enquiry may be illuminating. With the end of the Company's monopoly came an anticipation of more intrusive currents of industrial and commercial expansion from the metropolis. One current of official opinion held that openly coercive systems of dominating the labour process could be guided towards a reliance on the market and the legal system.³⁴ The authority of the law would also have to be strengthened to contain the conflicts arising from the penetration of European commerce and settlement. The ruling race itself would have to be brought more closely under the jurisdiction of the local courts.³⁵ Greater authority for rule of law also implied a renegotiation of the implicit terms of understanding with Indian elites, which had shaped various spheres of colonial authority. At the same time, the technological marvels of the industrializing metropolis, particularly in communications, seemed to offer a potential for enhanced power in the colony.³⁶ I am not arguing that the colonial state had actually advanced its technological and logistical abilities to a remarkable extent. The strains imposed by the frontier wars from 1838 made this very clear.³⁷ But visions of these

³⁴ The draft penal code of 1837 stated that the social evil of slavery was not the master's right to enforce service, but that he had 'a legal right to enforce . . . those services without having recourse to the tribunals.' *DPC*, Note B, in *PP*, 1837-38, vol. 41, p. 546.

³⁵ It was under such apprehensions that Act XI of 1836 removed the right of a British defendant to appeal upto the Presidency Supreme Court in a civil case, where an Indian could only appeal to the Company's highest court. Cf. Macaulay's minute, 28 March 1836, *PP*, 1837-38, vol. 41, pp. 220-1. British civil servants widely favoured the bringing of all European residents under the jurisdiction of the district criminal courts. Cf. *Committee on the mofussil police*, 1838, pp. 23-4, paras 62-5.

³⁶ Macaulay's outrage about the sense of danger felt within the Presidency jail at Alipur expresses this sense of untapped potential. It was an evil he wrote which existed, 'on the very spot at which the greatest quantity of European intelligence and power is concentrated. . . .' Minute on jail discipline, 14 February 1835.

³⁷ Cf. Major W. Hough, *A narrative of the march and operations of the army of the Indus*, 1841, and Sir P. Cadell, *History of the Bombay army*, 1938, pp. 171-2, on the difficulties of commissariat and transport.

new technologies may have shaped that sense of expanded capacity which pervades policy discussions in the reform decade.

Taking the Public Execution 'More in Hand'

I begin my description of changes in the penal regime with the closer regulation of the public punishments of hanging and flogging and then move to the discussion around the jail regime. The application of the Islamic law in the Company's criminal courts provides one explanation for the restricted use of the death penalty in comparison with the contemporary criminal law of England.³⁸ The only property offence for which death could be inflicted was that of 'robbery with open violence' if marked by special cruelty or if the offender was guilty of a repetition of this crime.³⁹ In 1831 therefore the Court of Directors had been able to cite the figures of capital punishment in India to the Select Committee as illustrative of the 'mild' nature of criminal law in India as compared with the more sanguinary code of England.⁴⁰ In the debates on judicial reform in India there was no pressure to increase the frequency of capital punishment.⁴¹ There was a brief evocation of the anti-dacoity terror of early-nineteenth-century Bengal in the thug hangings which took place at Sagar

³⁸ Cf. J. Fisch, *Cheap lives*, p. 7. Fisch points out that in the early years of Company rule it was the 'mildness' of Islamic law and the loopholes it gave the offender which were criticized by British officials. For the use of capital punishment in the English criminal law see L. Radzinowicz, *A history of English criminal law and its administration from 1750*, vol. 1, 1968.

³⁹ Reg 53, s 4, cl 2, 1803. The death penalty could be imposed otherwise only for wilful murder, returning from transportation for life, and rebellion under declaration of martial law.

⁴⁰ *PP*, 1831-32, vol. 12, pp. 208-9. Even for 1841-4, a period after the capital provisions of the English law had been modified, W.H. Sykes noted that the proportion of those condemned to death to the number tried was lower in the Bengal Presidency than in England. 'Statistics of the administration of civil and criminal justice in British India from 1841 to 1844, both inclusive', *JSSL*, 1846, pp. 310-38. However, he does not clarify whether those condemned to death in England were actually executed.

⁴¹ However several officers of the Madras Presidency criticized the draft code of 1837 for limiting capital punishment to wilful murder and waging war against government. They wished to extend it to gang robbery. Second report on the Indian Penal Code, July 1846, para 458, *PP*, 1847-48, vol. 28, p. 211.

and Jabbalpur between 1830 and 1832.⁴² But the more general tendency, as exhibited in a series of orders passed from 1829, was of prohibiting various exchanges between the condemned man and the public, and trying to ensure a swifter and more efficient organization of his despatch. These directions also indicate a new sensitivity about subjecting the condemned to religious deprivation to add to their disgrace. Just hanging was good enough. A circular of 1833 therefore prohibited the practise of exposing the body on a gibbet.⁴³ If friends or relations did not claim it, the magistrate was to dispose of the body in the mode 'most consonant with the tribe and caste of the sufferers.'⁴⁴ Evidently it was the use of religious terror in a public spectacle which was unacceptable, for officials still regarded it as a valuable component of transportation. Other orders sought to pare down the execution to a simple and efficient process, eliminating any excesses of suffering which might horrify human feeling and draw pity for the criminal. In 1830 the Nizamat Adalat circulated a sketch for an improved 'drop' for hanging, warning magistrates to prevent 'unnecessary and protracted suffering.'⁴⁵ The botched execution disturbed after all 'the solemn impression meant to be conveyed, and . . . the operation of the spectacle as moral example. . . .'⁴⁶

⁴² Cf. H.H. Spry, *Modern India*, I, 1837, pp. 165–8.

⁴³ CONA, No. 140, LP and WP, 1 November 1833, 6 December 1833, p. 166. In 1797, magistrates were ordered to expose the bodies of murderers on a gibbet at or near the scene of the crime. Banaras CC to Magt Mirzapur, 11 January 1797, Mirzapur Collectorate, Pre-Mutiny, Basta 7, Series v, vol. 43, RAA. Gibbeting prevented the family from performing the funeral rites. It certainly left an imprint on collective memory for in 1868 the people of Faridpur still remembered that the gibbet there had last held the body of one Goriah *mochi*. By this date the apparatus was an object of antiquarian interest in the Asiatic Society's museum. Cf. N. Chevers, *A manual of medical jurisprudence in India*, 1870, p. 567. *Mochi*: cobbler.

⁴⁴ CONA, No. 140, 1 November 1833, 6 December 1833, p. 166.

⁴⁵ CONA, No. 23, 23 April 1830, p. 119. A judge of Midnapur had commented on the 'shocking' management of executions, with the gallows constructed differently in every district and the procedure so inefficient that it aroused pity for the condemned man. He sent in a sketch for a 'moveable and portable' gallows. 'Criminal law in Bengal', *Calcutta review* (July–December 1849), p. 560. Cf. also CO, Sadar Faujdari Adalat, Bombay, 6 October 1832, No. 70, to SJs, *Circular orders of the Sadar Faujdari Adalat* (COSFA), vol. 1, Bombay, 1843, p. 37.

⁴⁶ Here the Nizamat Adalat ordered a certificate after every execution, reporting any accident, as for instance the breaking of the rope said to happen

There was also some discussion about introducing portable gallows, those which could be dismantled once the business was done.⁴⁷ But an Assistant Judge or Assistant Magistrate still had to attend this last rite of the law, whatever their personal repugnance for the duty, and the execution still took place in some prominent place to which the prisoner was conducted in a procession.⁴⁸ Spectators were still required, but they were to be kept at an emotional distance from the condemned man.

Equally important therefore were measures to curb certain ritualized exchanges between the condemned man and the public which had been allowed in the tradition of last indulgences. These were now criticized for constituting the offender as an object of pious charity or pity in the eyes of spectators. Moreover, the condemned man had sometimes used these concessions to virtually stage-manage his exit, to transform it into a kind of religious giving up of life attended by acts of piety, rather than a rite of judicial retribution.⁴⁹ However, other accounts of the gallows procession bring to mind the celebratory *tamasha* of a marriage, with the prisoner setting off in new clothes, adorned with flowers, scattering coins among the spectators, sometimes even to the accompaniment of music.⁵⁰ The procession could of course be conducted with a certain levity, gallows humour having its place in India as anywhere else.

But one can hazard an analogy with another procession, that in which the sati set out for her funeral pyre. There are references which suggest that the crowd believed that the body of the condemned man was charged with magical properties, just as the widow who declared her intention to immolate herself was supposed to be

far too frequently. CONA, No. 99, 6 January 1842, p. 328. Six years later it had to instruct the medical officer to certify that life was extinct before taking the body down, because of cases in which capital sentences had 'been rendered revolting and cruel' by undue haste. CONA, No. 18, 27 November 1848, pp. 426–7.

⁴⁷ CONA, No. 23, 23 April 1830, p. 119.

⁴⁸ 'Criminal law in Bengal', p. 561.

⁴⁹ For instance, a party of thugs hung at Jabbalpur requested the magistrate, 'that for every man hung five convicts might be released from gaol and that they might have a little money to be distributed in charity'. From the Government Gazette of 16 October 1830, in Fanny Parks, *Wanderings of a pilgrim*, vol. I, 1850, reprint, 1975, p. 152.

⁵⁰ Cf. 'Criminal law in Bengal', pp. 560–1. *Tamasha*: spectacle.

transformed with divine power. 'They have a superstition', observed Lt. Colonel Fitzclarence, 'that a man about to be executed imparts a sanctity to all he touches; and in a manner similar to this, he always throws flowers among the crowd, who eagerly scramble for them.'⁵¹ In deprecating the idea that the abolition of sati would be dangerous, an army officer revealed the way in which the condemned man could transform his punishment into a ritualized giving up of life. The crowd, wrote Col. Tapp, treated the sati as it did any other tamasha:

It might be supposed that those who catch at the flowers scattered by the misguided victim must feel a deeper interest in the ceremony, but the same eagerness is manifested to catch the balls which have passed through the body of a European at a military execution, and the grain, cowries, etc. thrown about by a criminal on the way to the gallows.⁵²

The magical field surrounding the condemned man could also assume a threatening aspect for spectators. The spirit of a man who had met a violent end, particularly if he had been the victim of injustice, or had committed suicide in protest against some injury, was believed to rove restlessly, constituting a potential source of danger to the living.⁵³ It was reported that in India the executioner sometimes made an incision behind the ankles of the dead body, for fear the spirit would pursue him.⁵⁴ This suggests the executioner thought he had incurred some 'blood-guilt', instead of regarding himself as the impersonal executor of judicial sentence. One could speculate that there was a gap still between society's notions about who had the right to claim retribution and the government's exclusive claim to this authority.⁵⁵ F.J. Shore

⁵¹ Lt. Col. Fitzclarence, *Journal of a route*, 1819, p. 157. Fanny Parks reported that mothers collected the cowries strewn by a sati as she walked around the pile, and hung them around the necks of their sick children as a cure for disease. *Wanderings of a pilgrim*, I, p. 95.

⁵² Lt. Col. Tapp to Captain Benson, 16 December 1828, *CLWCB*, I, pp. 119-20.

⁵³ Cf. L.A. Babb, *The divine hierarchy*, 1975, pp. 90-1. Cf. also chapter three.

⁵⁴ 'Criminal law in Bengal', p. 559. Cf. also *CONA*, 23 April 1830, No. 23, p. 119.

⁵⁵ Spierenburg attributes the 'infamy' of the medieval executioner in Europe to the fact that for the people he symbolized the expropriation of private vengeance by territorial lords who began to administer punishment

recounted an incident in which a Hindu juror said he would not like to have blood on his hands even though he felt that the prisoners were guilty of the charge of affray and murder.⁵⁶

Officials had often expressed an anxiety that superstition or a belief in destiny, came in the way of a just appreciation of the relationship between crime, law and punishment:

where superstition prevails to such a lamentable extent as this, death, the last sacrifice of the law, is robbed of all its terrors. The people . . . sympathise with the expiring criminal, as a sacrifice to fate-purified by the extreme unction of the ruling power — and the lamentable scene closes with an interchange of civilities between the spectators and the dying culprit.⁵⁷

The course of action which A.D. Campbell suggested was that the Executive Government should take the punishment of death more into its own hands, with a view of gradually diminishing the number of capital executions, increasing their solemnity and effect, and organising a system for the occasional revision of capital sentences.⁵⁸

The multiplicity of meanings which could jostle around the execution were now held to detract from the authority of the law.⁵⁹ This unpredictability could be particularly embarrassing when an important display of 'just retribution' was at stake. The thug hangings at Sagar show how the actions of the condemned men and of the spectators could leave the government with a sense of uncertainty about the message of the scaffold. The condemned men did not go to the gallows cowed by the stern justice of the paramount power. Instead they literally took their death into their hands, testing the ropes and swinging themselves off with great bravado.⁶⁰ Henry Spry, medical officer at Sagar, describes one

to people who had not wronged them personally. P. Spierenburg, *The spectacle of suffering*, 1984, pp. 5, 29.

⁵⁶ F.J. Shore, to Secy, Judl Dept, 30 August 1834, Home Misc, 790.

⁵⁷ A.D. Campbell, Second report on the Indian Penal Code, *PP*, 1847-48, vol. 28, para 459, p. 95.

⁵⁸ *Ibid.*

⁵⁹ Cf. T.W. Laquer for a brilliant examination of the public execution as a theatre of fluidity, and a critique of a view of the execution as 'semiotically stable and relatively closed'. T.W. Laquer, 'Crowds, carnival and the state in English executions, 1604-1868', in A.L. Beier, D. Cannadine and J.M. Rosenheim (eds), *The first modern society*, 1989, pp. 305-6.

⁶⁰ H.H. Spry, *Modern India*, I, pp. 165-8.

gang there as spending their last night 'in displays of coarse and disgusting levity' and singing all the way to the gallows.⁶¹ The Indian spectators at one of these group executions asked Sleeman to have an incision made behind the ankles of the prisoners to prevent the return of their spirits.⁶² Despite the order of 1830 prohibiting this practise, Sleeman consented, saying that the spirits of the thugs were considered particularly mischievous.⁶³ Clearly the condemned men had been able to leave the impress of some special potency on the spectacle. But did the response of the spectators also indicate some uncertainty about the sentence?⁶⁴

The sensational hanging of Nawab Shams-ud-din in 1835 on the charge of hiring an assassin to murder William Fraser, the Commissioner of Delhi, was another morality play which went badly wrong. The execution at Kashmiri gate in Delhi was supposed to demonstrate that British justice would not spare even the high-ranking offender.⁶⁵ But so heavy were the military precautions taken to prevent an outburst that a rumour circulated that the sentries would shoot anyone who went outside the city walls to look at the execution.⁶⁶ The Nawab, wrote Sleeman, 'prepared himself for the execution in an extremely rich and beautiful dress of light green, the colour which martyrs wear. . . .'⁶⁷ He was made to change his clothes. Nevertheless, the Muslims of Delhi claimed that he was a martyr, saying his body had turned to face the direction of the Prophet's tomb. Pilgrimages were made for some time to his grave.⁶⁸ Whatever the explanation for

⁶¹ Ibid.

⁶² WHS to F.C. Smith, 1832, Home Dept, T&D, List I, Cons G.1, NAI.

⁶³ Ibid. In 1830 the Nizamat Adalat prohibited the practise 'which seems to have prevailed widely' of hamstringing criminals before or after execution. This circular came with the sketch for a more efficient 'drop'. CONA, No. 23, 23 April 1830, p. 119.

⁶⁴ D.F. Mcleod had opposed capital punishment for thugs, pointing out that Indian rulers seldom put them to death unless the relatives of the victims were there to demand retribution. D.F. Mcleod to F.C. Smith, AGG, SNT, 10 October 1834, Foreign Dept, Pol. Cons, 11 May 1835, No. 78, para 36, NAI.

⁶⁵ ' . . . there hung before the public gaze a native nobleman expiating the heinous crime of murder.' C.J. French, *Journal of a tour in Hindustan*, 1854, p. 43.

⁶⁶ Sleeman attributes the rumour to an order wrongly interpreted by the town crier. *Rambles and recollections*, 1975, p. 475.

⁶⁷ Ibid., p. 472.

⁶⁸ Ibid., pp. 472-3.

this feeling, the Muslims of Delhi had communicated their rejection of the sentence.⁶⁹

The government began to curb the tradition of 'last indulgences' arguing that the prisoner as the object of charity aroused pity rather than loathing. In 1844 the Nizamat Adalat prohibited the bestowal of money and new clothes on the condemned man for such donations were 'calculated to detract from the force and effect of the solemn warning. . . .'⁷⁰ However, this order was reported to have brought the government into disrepute,⁷¹ so it was modified. Government would provide the condemned man with a set of decent clothes but prohibited 'music, money and other indulgences'.⁷² Evidently a man had to be allowed to go to his death in clean clothes, but this was to come as an indulgence from government, not as a pious donation from the public.

Moral Sensibility and Punishments of Infamy

Other punishments which publicly stigmatized the offender, such as *godna* (branding), tashir, and flogging were also re-evaluated in this period. *Godna*, the tattooing of the name of the criminal and his offence on his forehead, was not drawn from any indigenous punishment, though it has some resemblance to mutilation. It originated in a practice of feminine ornamentation, and was probably the Company's peculiar contribution to punishments of infamy.⁷³ It was used to brand prisoners sentenced for life to prevent escapes;⁷⁴ but also to punish perjury, forgery, and the counterfeiting of coins and public securities, to stamp these crimes with special infamy.⁷⁵ This sentence meant that a permanent mark of

⁶⁹ Both the Nawab and his accomplice had refused to confess. Cf. 'Murder of Commissioner Fraser — Delhi 1835: a tale of circumstantial evidence.' *Blackwood's Edinburgh magazine* (January 1878), pp. 32-8.

⁷⁰ CONA, to Magts, NWP, No. 177, 4 September 1844, p. 376. The Madras Faujdari Adalat had prohibited judges from giving any allowances to prisoners under sentence of death, 2 February 1835. BC F/4/2147, No. 102790.

⁷¹ 'Criminal law in Bengal', p. 560.

⁷² CONA, No. 182, 27 September 1844, pp. 378-9.

⁷³ Cf. RB to GG in C, 22 October 1788, BRC P/51/27, 1 December 1788, pp. 641-76. RB to Sub-Secy, Bengal Govt, 21 September 1790, BC F/4/520, pp. 213-24.

⁷⁴ CONA, 23 April 1795, 15 May 1795, in K.K. Datta (ed.), *Selections judicial records Bhagalpur*, 1968, p. 119. Cf. also Reg 4, 1797.

⁷⁵ Reg 17, 1797.

disgrace could be attached to a limited term of imprisonment. The dismal certainty that Indians did not view perjury in the Company's courts as a social disgrace, provoked the stubborn response that punishment must be all the sharper to provide the sanction lacking in public opinion.⁷⁶ Regulation 2, 1807 went a step further, in adding tashir (public exposure), to the punishment for forgery and perjury. This was the only regulation which allowed tashir; judges who extended it to other 'ignominious' offences were told they had exceeded their powers.⁷⁷ A decade later restrictions began to be placed on these punishments. In 1817 godna was abolished for offenders sentenced to limited terms of imprisonment,⁷⁸ and tashir began to fall into disuse.⁷⁹ In their notes on the draft penal code of 1837 the law commissioners opposed 'degrading public exhibitions', arguing that individual sensibilities varied so widely that it was a most unequal punishment.⁸⁰ A regulation for abolishing tashir was drafted in September 1838,⁸¹ but godna and tashir were finally abolished only in 1849.⁸²

The issue of corporal punishment provides a particularly interesting instance of the controversies surrounding public punishment. Flogging was used for a wide range of offences, both for the pain and the shame it inflicted. It was not at first specifically reserved for the more disgraceful crimes. However, the judge or magistrate was always supposed to satisfy himself that the offender was not of a rank or caste which made it improper to inflict corporal punishment.⁸³ The use of the Islamic law in the Company's

⁷⁶ Cf. judges' responses on the effect of the perjury regulation of 1797, question 36 of GGs interrogatory, 1801-2, *PP*, 1812-13, vol. 9. However the punishment was rarely inflicted because it was difficult to prove these crimes.

⁷⁷ Cf. case of Yar Mahomed, 26 March 1811, where the judge used tashir for a theft involving a breach of confidence, and the case of Bheekum Bhutt, 24 June 1812, in which the judge added tashir to the punishment for sodomy. *NAR*, 1, 1805-19, pp. 223, 234-5.

⁷⁸ Reg 17, s 12, 1817 abolished godna as a punishment for perjury and forgery.

⁷⁹ A correspondence of 1838 suggests that tashir was rarely awarded. *Indian Leg Cons*, P/128/94, 10 September 1838, No. 16.

⁸⁰ Note A, *DPC*, p. 540.

⁸¹ *Indian Leg Cons*, P/128/94, 10 September 1838, No. 16.

⁸² Act II, 1849.

⁸³ Cf. Colebrooke, *Supplement*, pp. 4, 11. In England too, gentlemen were exempted from corporal punishment on the reasoning that the loss of honour would be a greater pain than the law intended. J.M. Beattie, *Crime and the courts*, p. 463.

courts meant that the number of lashes was always specified, whereas in England there was no statutory regulation governing the number of strokes or the manner of their infliction.⁸⁴ The correspondence about flogging, just after the Cornwallis regulations of 1793, was only about ways to inflict it with sufficient severity while avoiding fatal injury. An order of 26 April 1795 replaced the traditional *korah* with the 'cat' as the instrument for corporal punishment.⁸⁵ However, the pain inflicted by the cat was considered too slight, so the *korah* was restored the following year.⁸⁶ The discussion indicates little concern if any about the permanent scars left on the offender's back. In fact police officers considered this a useful record of a past conviction, and would check to see if the suspect was a *daghi*.⁸⁷ In 1825, however, a regulation was passed to restrict corporal punishment, abolishing it for affrays and for contempt of court, reducing its severity by

⁸⁴ L. Radzinowicz and R. Hood, *A history of English criminal law*, vol. 5, 1986, p. 689, and n. 2, p. 689. Also Ian Gibson, *The English vice*, 1978, pp. 153-4.

⁸⁵ Cf. Judge, Murshidabad CC to Magt Bhagalpur, 26 April 1795, *Selections judicial records Bhagalpur*, p. 128 for a correspondence on the merits of the military 'cat' versus the *korah*. The 'cat' consisted of five strips of leather fastened to a short wooden handle, the *korah* of a single lash. The former was considered less severe and so 39 lashes of the *korah* were replaced by 500 of the 'cat', 25 by 300 and 15 by 200, *ibid.* The sentences of corporal punishment passed by the magistrate were inflicted with the rattan.

⁸⁶ Actg SJ, Murshidabad CC to Magt Bhagalpur, 26 December 1796, *ibid.*, p. 196. The Magistrate had argued that from the manner in which the culprits bore the cat and from the appearance of their backs, the punishment was too slight, falling far short of the rattan. Judge-Magt Bhagalpur to Judge, Murshidabad CC, 31 January 1795, *ibid.*, p. 89. The magistrate of Dacca suggested an 'admirable contrivance' for preventing serious injury in the form of a hide jacket exposing only the back and shoulders; this was made compulsory. Regr Murshidabad CC to Magt Bhagalpur, 1 November 1797, *ibid.*, p. 231. A surgeon of the Madras Presidency expressed a similar attitude towards corporal punishment. He argued that it was a severe punishment in India because of 'the instrument with which it is inflicted, not the pain that is caused or the ignominy . . .'; splinters from the rattan led to deaths from lockjaw. B. Heynes, *Tracts historical and statistical on India*, 1814, pp. 321-2.

⁸⁷ That is, a marked man. Recollection of J.P. Grant, Offg Secy, GOI, writing to Chief Secy, Bombay, 3 February 1840, *Leg Cons*, A and C, 3 February 1840, No. 10, NAI. Even in 1831 an officer could still recommend the rattan for thieves on the grounds that it marked their backs for 10-12 years. Regr NA to Secy, Judl Dept, 10 May 1833, BCrJ, LP, 8 July 1833, No. 6, WBSA.

substituting the korah with the rattan, and abolishing this punishment for women altogether.⁸⁸ The draft preamble had admitted the 'severity' of the korah, and referred to 'considerations of delicacy and humanity' in abolishing corporal punishment for women. It had also exempted men above and below a certain age from flogging.⁸⁹ But the final regulation made no reference to the harshness of the korah, or to considerations of humanity. It accepted an exemption on the grounds of gender, but not on the grounds of age. Evidently the theme of humanity had not become widely topical and government was probably unwilling to admit a criticism of previous practise. The abolition of corporal punishment for affrays suggests an effort to soften the harsh visage of colonial justice, but the conciliatory move was especially directed towards the 'respectable classes' believed to be often sentenced for this offence. Civil pacification required that these acts be punished, but there was some hesitation now about allowing the penalties to clash too violently with notions of honour held by the 'respectable classes'.⁹⁰

The instrument of corporal punishment again became the subject of a medical and official correspondence between 1827 and 1831. But the questions were somewhat different now. Did the physical effects of the rattan associate the penal regime with suggestions of torture? Was the permanent stigma of a scarred back inappropriate to the crime, and should corporal punishment be entirely replaced by imprisonment?⁹¹ Two medical officers of the Madras Presidency criticized the physical effects of the rattan, and recommended the cat, the one arguing that the rattan was a cruel instrument and the other that it incapacitated the offender for hard labour.⁹² The debate now engaged more prominently with

the theme of humanity and indicated that imprisonment with labour might be the more important part of the sentence. As with other punishments of infamy, critics of public flogging characterized it as an unequal penalty, its effects varying it was said with the rank and sensibility of the offender. The judicial discretion exercised in its infliction was also said to introduce an element of uncertainty and inequality into the law. In 1831 the Bengal government questioned magistrates, judges and civil surgeons, on whether the rattan should be replaced by the cat, and whether corporal punishment should be restricted, or even replaced altogether by terms of imprisonment.⁹³ It is interesting that of all the officials consulted, only two recommended the abolition of corporal punishment.⁹⁴ The Nizam Adalat suggested that the rattan be retained but with uniform specifications as to length and circumference, and with a reduction in the number of stripes. One of their reasons for favouring the rattan over the cat illustrates the heightened self-consciousness about associating justice with the public infliction of pain:

a very serious objection likewise arises to the use of the cat from the length of time which would be occupied in its infliction, by which the disgusting spectacle of continued punishment at our Courts, throughout a major portion of the day, would be held up to the eyes of the people.⁹⁵

implying that it kept the offender from the more important part of his punishment, hard labour. B. William to Cr Judge, Mangalore, 20 September 1827 and L.G. Ford to Regr, Court of Appeal, Western Court, 17 July 1830, in CONA, 16 September 1831, Mirzapur Collectorate, Pre-Mutiny, Basta 10, Series 7, vol. 67, RAA. In the Madras Presidency the rattan was replaced by the cat in 1829 on the argument that the cat would punish with greater uniformity and prevent 'serious bodily injury far beyond the intention of the law'. Preamble, Reg 8, 1828, Madras Presidency.

⁹³ Regr NA to Secy, Judl Dept, 10 May 1833, BCrJ, LP, 8 July 1833, No. 6, WBSA, referring to Depy Secy Thomason's enquiry of 30 August 1831.

⁹⁴ Ibid. The enquiry indicated the absence of any strong current of medical opinion in the Bengal Presidency in favour of abolishing corporal punishment. The two medical men of the Madras Presidency had advocated a different instrument for corporal punishment, not its abolition. Cf. also J. Thomason, Depy Secy, Bengal Govt to Regr NA, 30 August 1831, in CONA, 16 September 1831.

⁹⁵ Regr NA to Secy, Judl Dept, 10 May 1833, BCrJ, LP, 8 July 1833, WBSA. The cat being a lighter instrument, the number of lashes would have been proportionally increased, cf. fn 85.

⁸⁸ Reg 12, 1825.

⁸⁹ C. Smith's draft, enclosed in Regr NA to Chief Secy, 1 April 1820, BCrJ, 26 May 1825, No. 16, p. 353, WBSA.

⁹⁰ The outlines of this argument are evident in an earlier discussion about making a distinction between misdemeanours such as affray and the more disgraceful crimes, by punishing the former with private labour and the latter with public labour in fetters. CONA, 18 August 1820. See below.

⁹¹ Cf. Regr NA to Secy, Judl Dept, 10 May 1833, BCrJ, LP, 8 July 1833, No. 6, WBSA.

⁹² B. William, Asst Surgeon, Mangalore described prisoners with 'backs sloughed into large sores, they all become miserably thin. . .'. L.G. Ford, Surgeon, Tellicherry gave other terrible details of the effects of the rattan.

However, the discussion also indicated the absence of a strong opinion in favour of complete abolition. So in 1834, when Bentinck passed a regulation abolishing corporal punishment and substituting imprisonment, it was a remarkable gesture towards reform, not less so because it was a measure in advance of legislation in England.⁹⁶ The preamble of this innovatory regulation summarizes in effect the reform argument against public spectacles of pain and infamy:

Whereas corporal punishment has not been found efficacious for the prevention of crime, either by reformation or example; and whereas it is always *degrading to the individual*, and by fixing marks of infamy, which often are forever indelible, *prevents his return to an honest course of life*; and whereas there is every reason to fear that it is in many cases *injudiciously and unnecessarily inflicted*, becoming a grievous and irremediable wrong; and whereas it is becoming expedient that *the British Government, as the paramount power in India, should present in its own system the principles of the most enlightened legislation*, and should endeavour by its own example, to encourage the native states to exchange their *barbarous and cruel* punishments of maiming, or tortures, of loss of limb, for those of a more merciful and wise character, by which the individual may be reformed and the community saved from these *brutalising exhibitions* . . .

Significantly, it was as a public spectacle that flogging was found most objectionable. It retained a significant presence behind the walls of the jail as a punishment for breach of discipline.⁹⁷ The regulation of 1834 was followed by Bentinck's general order of 1835 abolishing corporal punishment in the Indian regiments of the Company's army. Pressure for fiscal retrenchment in the 1830s had made it difficult to buy the loyalty of the sipahi on better terms. The abolition of corporal punishment was one way of

⁹⁶ 'A regulation for abolishing corporal punishment; for substituting a fine in certain cases for a sentence of labour; and for the gradual introduction of a better system of prison discipline'. The regulation also abolished the magistrate's powers to flog chaukidars for neglect of duty. This exemption was supposed to enhance the status of the watchman and to distinguish him from other village menials. Reg 2, 1834 was operative only in the Bengal Presidency. Cf. 'Second report on the Indian penal code', para 506 for strong objections from the Madras Presidency against the abolition of flogging. PP, 1847-48, vol. 28.

⁹⁷ Reg 2, s 6, 1834. In fact, in 1846, in the aftermath of jail riots against messing, the Nizamat Adalat widened the magistrate's powers to inflict stripes for infractions of jail discipline. CONA, 13 November 1846, No. 235, p. 416.

refurbishing the status of military service and attracting respectable recruits.⁹⁸ But in arguing his case for the abolition of corporal punishment in the army, Bentinck moved from the more general argument about human dignity in the forms of punishment to draw again upon the familiar theme about conciliating the 'caste and respectability' of the *purbia* soldier.⁹⁹

The measure was a controversial one.¹⁰⁰ The exemption of the Indian sipahi from whipping on the grounds that it was a degrading punishment, when the British soldier was still subject to the lash, was criticized as a dangerous imbalance in race authority. In the 1840s in the face of the difficulties of military service on harsh and distant frontiers and a reduction in compensatory allowances, the regulation was held to have weakened the discretionary authority of the commanding officer and blamed for the sporadic mutinies which took place.¹⁰¹ Corporal punishment was restored to military discipline in 1845 and to criminal justice by Act III of 1844.

The military context for the reintroduction of flogging was somewhat different from the civilian one,¹⁰² although in both cases

⁹⁸ Corporal punishment, wrote Bentinck, was 'injurious to those feelings of the most importance for us to cultivate among our native soldiery, satisfaction with their condition, and allegiance to the state. . .'. Minute on the abolition of corporal punishment in the native army, 16 February 1835, PP, vol. 40, 1836, pp. 453-8.

⁹⁹ ' . . . this degradation could no longer be inflicted upon the high caste sepoy of the Bengal army, after it had been abrogated as a punishment in the general regulations of this presidency.' Ibid., p. 453. W. Badenach, with twenty years in the Company army, had put forward practically the same arguments in 1826 for abolition: that flogging was not necessary for discipline, that it degraded the individual, *more so* when he was a high caste soldier, drawn from a class superior to that of British recruits, and for whom punishment before low caste men was a severe degradation. W. Badenach, *Inquiry into the state of the India army*, 1826, pp. 104-14.

¹⁰⁰ In the three Presidency committees appointed to discuss the issue the prevailing opinion had been against the abolition of flogging in the native army though many favoured its restriction.

¹⁰¹ Cf. Mily Dept L/Mil/5/417, No. 341, pp. 249-74, L/Mil/5/418, No. 353, pp. 340-82, for correspondence. R.J.R. Campbell, *The Indian mutiny*, London, 1857, p. 27, J.W. Kaye, *A history of the sepoy war in India*, vol. 1, 1897, p. 199. Ibid., pp. 203-21 for the difficulties of frontier service.

¹⁰² Douglas M. Peers makes a convincing case that a weakened commitment to the traditional high caste orientation of the Bengal army was at the heart of calls to restore corporal punishment for sipahis. 'Sepoys, soldiers and the lash', *The Journal of Imperial and Commonwealth History*, 23, 2 (1995), pp. 211-41.

the advantages of its summary character were stressed. The discussion about corporal punishment in criminal justice emerged from the issue of overcrowding in jails and the high rates of sickness and mortality which were attributed to this.¹⁰³ The Medical Board recommended the restoration of corporal punishment to ease the pressure on jails.¹⁰⁴ The cost advantages of this form of punishment over imprisonment were also obvious, so corporal punishment was re-introduced, but restricted to cases of petty theft extending upto the value of Rs 50. The magistrate could impose thirty strokes of the rattan for this offence, but without attaching a term of imprisonment.¹⁰⁵ Corporal punishment was also recommended as a means of preventing the contamination of the young offender in jail. Here the element of humiliation or pain was played down by invoking the metaphor of a mild socially sanctioned discipline. The young offender convicted of petty theft could be punished with a maximum of ten strokes of the rattan inflicted 'rather in the way of school discipline than ordinary criminal justice.'¹⁰⁶ However, some of the arguments in favour of corporal punishment had also cited its special suitability for the Indian situation. The Medical Board argued that in a poor country, corporal punishment released the offender to support his family, so it was more conducive to welfare.¹⁰⁷ Others argued that it was

¹⁰³ The Court of Directors said imprisonment was much too freely used as a mode of punishment in India. If the jail population was reduced, existing jails would suffice, and sickness and mortality could be reduced without further expenditure. Extract letter from COD, Judl Dept, 28 September 1842, No. 12 in Medical Board Proceedings (MB Progs), 15 June 1843, No. 5, NAI. The Nizamat Adalat also pointed out that overcrowding made it difficult to implement the sentence of banishment, i.e. the transfer of the prisoner out of his home district. Regr NA to Secy Bengal, 31 March 1843, Bengal Judl Progs, 17 April 1843, No. 17, WBSA.

¹⁰⁴ MB to President in Council, 31 March 1843, Bengal Judl Progs, 5 June 1843, No. 127, WBSA; and Hutchinson, *Observations*, p. 89.

¹⁰⁵ Act III of 1844.

¹⁰⁶ One issue in the debates around slavery had been whether a special provision should prohibit the master's powers of moderate correction, 'such as a Parent has in respect of a Child or Master in respect of a Scholar or apprentice.' Legal recognition was withdrawn from slavery but without this specification. Act III of 1844 seemed to reinstate such images of paternalistic authority but now under the aegis of magistracy.

¹⁰⁷ MB to President in Council, 31 March 1843, Bengal Judl Progs, 5 June 1843, No. 127, WBSA. Here is an echo of that concern to prevent vagrancy which was discussed in chapter four.

the summary and visible nature of the punishment which made it useful with certain 'backward people';¹⁰⁸ or that corporal pain left a greater impression on the lowly and the depraved whose sensibilities were too hardened to suffer from imprisonment. This argument was not a prominent one in the reintroduction of corporal punishment. But the act had re-invested the magistrates with powers to inflict a summary and humiliating punishment despite all the reform arguments against such judicial discretion.

The Jail Regime: Humanity, Public Utility, Cost-cutting

As forms of public punishment were criticized, the prison regime began to be discussed more intensively as the alternative. In the early years of the Company's criminal justice the regime of confinement was one sketched out in very broad terms.¹⁰⁹ The punitive element of the system was understood to rest on the 'salutary example constantly exhibited to the public' of prisoners at hard labour, rather than on an elaborate set of regulations governing dress, food and conduct.¹¹⁰ The very terms in which sentences were formulated, as so many 'years on the Hon'ble Company's works' or 'years on the public roads', indicates that the sight of the prisoner toiling and in fetters was considered absolutely necessary both for punishment and deterrence.¹¹¹ Imprisonment as confinement alone was very much a subsidiary category. It was an exception initially permitted only to the old, sick or infirm,¹¹² but

¹⁰⁸ J.R. Ousely, AGG and Commr in the South West Frontier (Chota Nagpur), argued for the re-introduction of corporal punishment on such grounds, 24 December 1843, Bengal Judl Progs, 9 January 1844, No. 181, WBSA.

¹⁰⁹ G. Toynbee, *A sketch of the history of Orissa*, 1873, pp. 79-80.

¹¹⁰ Progs of Vice President in Council, 5 January 1798, Judl Dept, Mirzapur Collectorate, Pre-Mutiny, Basta 7, Series v, vol. 44, 1798-1802, RAA. A circular of 1803 prohibited the employment of convicts in gardens and other private works on the grounds that it 'militates in a great degree with the object of judicial imprisonment, by lessening the Stigma and Example of it.' Regr Murshidabad CC to Magt Bhagalpur, 29 June 1803, in *Selections judicial records Bhagalpur*, p. 323.

¹¹¹ H.J.S. Cotton, *Memorandum on the revenue history of Chittagong*, 1880, p. 222. Cf. also CONA to CCs, 6 April 1796, stating that the employment of convicts sentenced to imprisonment in the repair of public roads was consistent with the Islamic law.

¹¹² CONA to CCs, 6 April 1796, No. 3, p. 2.

soon extended to the prisoner whose rank or situation made him 'an improper object to be employed on the public roads'.¹¹³ A circular of 23 April 1795 imposing a few prohibitions was the only guideline for the early jail regime in the Bengal Presidency.¹¹⁴ Even the few restrictions of 1795 were rapidly curtailed with the withdrawal of the orders banning tobacco, and of those prohibiting prisoners from cooking their own food.¹¹⁵ Perhaps prisoners were able to resist the imposition of messing in 1795-6 because it was the sentence of labour rather than the elaboration of a regime of segregation and penal distinction that was more important in the hierarchy of sanctions. An interesting instance of this is provided by the Dacca magistrate who reported that seeing the distress of the women and children of prisoners who used to be supported from their daily allowance he had appointed these women as cooks, giving them the money.¹¹⁶ Viscount Valentia saw convicts building the road near Bhagalpur who were permitted to have their families near them during the day, and at night the women and children lived in huts built near the prisons.¹¹⁷

Descriptions of the early jails suggest that there was no great effort to invest them with distinct architectural features.¹¹⁸ The prisoners were confined in sections of old forts or palaces, in

¹¹³ CONA to CCs, 10 August 1796, No. 8, pp. 3-4. Such cases were supposed to be exceptional.

¹¹⁴ Cf. CONA to Magt Bhagalpur, 23 April 1795, for the earliest rules. *Selections judicial records Bhagalpur*, p. 119. The prohibitions against smoking, liquor and drugs must have been quite nugatory given the opportunities afforded by outdoor labour and a money allowance for food. Requesting additional guards for prisoners the magistrate of Bhagalpur said, 'almost the whole of them are daily out either for the Purpose of purchasing the necessities of life or of repairing the public roads . . .'. Magt Bhagalpur to Sub-Secy, Judl Dept, 17 July 1794, *ibid.*, p. 63. Further instructions for jails were issued in 1811 and Regulation 14 of 1816 enacted for breach of jail discipline.

¹¹⁵ Patna CC to Magt Patna, 1 December 1795, restoring permission to use tobacco, in K.K. Datta (ed.), *Selections Patna correspondence, 1790-1857*, Patna, 1954, p. 229. Offenders sentenced for seven years or upwards had been prohibited from cooking their own food; instead a Brahmin cook was provided for Hindus, and a Muslim one for Muslims. But the prisoners protested and refused to eat and the order was rescinded in 1797. *Ibid.*

¹¹⁶ W. Camac, Magt Dacca City, to Sub-Secy, 7 June 1796, BCrJ 24 June 1796, No. 22, pp. 72-4, WBSA.

¹¹⁷ George Viscount Valentia, *Voyages and travels*, vol. 1, 1809, pp. 82-3.

¹¹⁸ However brick structures with arched roofs began to replace the more flimsy mud walls and thatched roofs.

rented bungalows, or thatched mud enclosures, and the site was usually right in the heart of the city or administrative centre.¹¹⁹ Provision for the classification of prisoners was minimal, the jail was partitioned into a few yards to separate the women prisoners and the undertrials.¹²⁰ Sometimes a further attempt was made to classify prisoners according to the court by which they had been sentenced.¹²¹ However, even this separation could not be sustained in the regime of outdoor labour to which the bulk of the prisoners were consigned.¹²²

By the 1820s individual magistrates were experimenting with indoor labour, to supplement outdoor labour rather than to replace it entirely.¹²³ But indoor labour also offered the possibility of developing a more discriminating scale of punishment. In 1820 the Nizam Adalat had ordered 'private labour' for misdemeanours such as affrays, on the grounds that in such cases 'the reformation of the offender is the principal end in view and not public exposure by way of example; the latter being reserved for higher crimes'.¹²⁴ The circular was modified on 17 May 1822 and the magistrate

¹¹⁹ A report of 1767 places the prisons of Calcutta in the Lal Bazaar and Barra Bazaar. Revd. J. Long, *Selections from the records of government*, 1793, p. 676. Cf. also N. Majumdar, *Justice and police in Bengal*, 1960, pp. 290-3. In Cuttack the prisoners were lodged in huts in the former regimental lines. Toynbee, *A sketch of the history of Orissa*, p. 78. The magistrate's gaol in Madras was in one of the bastions of the town wall, CPD, para 40. The jail at Cuddapah, in the Madras Presidency, was in the fort close to the market. Heynes, *Tracts*, 1814, pp. 321-2.

¹²⁰ Heynes describes the Cuddapah jail as divided into a number of *choultries*, open buildings, surrounded by a high wall. *Tracts*, p. 322.

¹²¹ The practise indicates the sketchy nature of record keeping in Indian jails. A report from Murshidabad stated quite candidly that the prisoners were classified according to their sentences and the court but that, 'these distinctions are generally nominal and only kept up to ensure the recollection of the dates of release.' CPD, Appendix 4, question 6, pp. 67-8. Cf. F.J. Shore, *Notes*, 1837, II, p. 371 for a similar description.

¹²² Cf. magistrates, Bengal Presidency, to the CPD on classification in jails. CPD, Appendix 4, question 6.

¹²³ Outdoor labour required a high ratio of guards to prisoners, usually 1:3 or 1:4. It was risky for prisoners sentenced for life and 'unseemly' for women offenders. Indoor labour would also employ those excused from outdoor labour because of their 'caste and rank'.

¹²⁴ CONA, 18 August 1820, Bengal Govt, Judl Dept, 27 June 1822 in CPD, Appendix 31. Affrays without homicide or serious wounding were usually termed 'misdemeanours'.

retained his discretion over the form of labour.¹²⁵ However, as I pointed out, the distinction between affrays and more 'heinous' crimes was recognized in the 1825 regulation which abolished flogging for affrays. This was an effort to vest the judicial system with legitimacy by indicating some leniency towards the broadly 'respectable' sections of agrarian society.¹²⁶ But indoor labour also began to be advocated as a punishment suitable for the petty offender, as a way of reform through the discipline of work without the disgrace of public exposure.¹²⁷ However this correspondence also reveals a preoccupation with enforcing the sentence of labour more stringently. The sight of convicts on the roads about the district, talking among themselves and with the guards, meeting friends and relatives, was criticized as a spectacle of penal laxity.¹²⁸ Experiments in prison discipline in the metropolis fostered a fascination with the penal potential of machines, in particular, the tread wheel, in facilitating the rigorous regulation of labour time, and enforcing measurable and therefore uniform quantities of work.

In many of its recommendations therefore, the 1838 Committee for Prison Discipline was in fact advocating the uniform or more extensive application of experiments already in progress.¹²⁹

¹²⁵ Ibid.

¹²⁶ In 1830 the Bengal government also suggested that since the necessity of making a severe example to punish affrays had diminished, such cases could be considered for clemency or mitigation. Secy, Judl Dept, to NA, 30 March 1830, in *CONA*, 16 April 1830, p. 118.

¹²⁷ From the second decade of the century officers began to suggest that vagrants be put to various trades in prisons to reform them. C.J. Middleton, Magt Allahabad, introduced a House of Industry as a means of punishing petty offenders without inflicting permanent disgrace and employing abandoned children to save them from crime. Middleton to Secy, Bengal Govt, 7 December 1815, and Halhed's memoir on the jail and manufactory at Moradabad, 22 April 1822, Judl Dept, 1821-2, No. 29B/37, MSA, pp. 798-801, 823. Cf. Judl Dept, vol. 46/55, 1821-2, pp. 727-58, MSA, for similar discussions in the Bombay Presidency. It is not clear how far magistrates were actually assuming this responsibility for vagrants. The usual practise of harassing them to move out of the district probably continued.

¹²⁸ F.J. Shore, *Notes*, II, pp. 373-4; 'Prison discipline in India', *Calcutta Review*, July-December 1846, pp. 470-1. Cf. Judge Surat to Chief Secy, Bombay, March 1823, describing the difficulty of getting work from a convict road gang and the advantages of indoor labour in enforcing constant employment. Judl Dept, vol. 46/55, 1821-2, MSA.

¹²⁹ For instance the system of rations and in some cases messing had already been implemented in the Bombay and Madras Presidencies. *CPD*, Appendix 4, replies to questions 12-13.

But the 1838 report was a cohesive blue-print for sharpening the rigours of a jail sentence through a regime of 'negative severities', one which would maintain the offender in health, but would deprive him of all the pleasures of the social and the familiar. The distinct nature of the jail had to be emphasized in food, labour and consort. Outdoor labour was criticized for allowing indiscriminate association, communication between prisoners and access to prohibited 'comforts'.¹³⁰ Indoor labour had to be 'dull wearisome and disgusting',¹³¹ the prison should not resemble a workshop. For this reason the Committee opposed the introduction of trades and crafts, favouring devices such as the treadwheel instead.¹³² The money allowance to prisoners, it argued, resembled too much the payment of wages.¹³³ It allowed the prisoner the pleasure of marketing, and the means of choosing between food, tobacco, and leisure by bribing the guard.¹³⁴ Cooking their own food, it pronounced, was one of the greatest enjoyments of the lower orders and should not be allowed in jail.¹³⁵ In opposing outdoor labour the Committee took up the familiar refrain that public disgrace for offences not considered infamous in society compromised the legitimacy of the judicial system.¹³⁶ To reinforce its objections to trades or crafts in jail, it argued that these would shame a man of high caste, extend the punishment to his family and create resentment against the law.¹³⁷ However, in recommending cooked food distributed in messes instead of money or rations, the Committee did not express any apprehensions about caste.¹³⁸

Outdoor labour continued to dominate the prisoner work regime, but the system of rations and then messing was pushed through in the Bengal Presidency despite indications that it would

¹³⁰ *CPD*, para 233.

¹³¹ *CPD*, para 268.

¹³² *CPD*, paras 251-2.

¹³³ *CPD*, para 6.

¹³⁴ *CPD*, para 60.

¹³⁵ *CPD*, para 70.

¹³⁶ *CPD*, para 233.

¹³⁷ *CPD*, para 238.

¹³⁸ *CPD*, para 41. It assumed that the appointment of a Brahmin and Muslim cook was sufficient concession to religious sentiment. Messing was recommended even though many officers of the Bengal and Agra Presidencies had opposed it, stating that prisoners would object because of caste distinctions. *CPD*, Appendix 4, answers to question 13, pp. 158-66.

be an administrative headache and increase expense, that its effects on health were uncertain, and that messing would meet with considerable resistance from prisoners.¹³⁹ As to the Committee's recommendations on labour, there was certainly no official consensus that the 'salutary example of public labour in fetters' could be dispensed with.¹⁴⁰ Many magistrates and judges continued to believe that seeing a man suffer was necessary to keep alive the dread of punishment. The factor of cost was another significant impediment to reform. Indoor labour and the more complex classification of prisoners would have required the extensive alteration of old jails or the building of much larger and more internally diversified new ones, but the government was unwilling to sanction any large scale expenditure.¹⁴¹ In addition, the difficulties of taxing zamindars or town dwellers for roads or municipal improvements had always made convict labour a valuable resource for building roads, draining ditches and clearing ground in and around colonial district towns.¹⁴²

This pool of labour became even more important in the 1830s and 1840s when the Indian government began to support schemes

¹³⁹ The NWP government envisaged problems of health, corruption in supply and increased expense. Narrative of progs of NWP Govt, 3rd quarter of 1840, paras 4-7, Home Misc 488, 1840-41, NAI. The Bengal Government reported that the average daily cost of feeding each prisoner was 8.326 pies under the money system, it had increased to 8.434 pies under the ration system and expenses were expected to rise with the new diet table of 1844. Govt of Bengal to COD, 22 March 1845, No. 5, General letters to COD, Judl, 10 January 1845-4 November 1845, vol. 26, WBSA.

¹⁴⁰ The Committee for Prison Discipline had argued that what deterred from crime was not the sight of punishment but 'the knowledge of the law with the belief that the law will be executed.' CPD, paras 196-8. But the Bengal government defended the practise of putting prisoners to building roads as just, exemplary and conducive to habits of industry. Bengal government to COD, 21 August 1837, No. 10, letters to COD, Home Judl, 1838, NAI.

¹⁴¹ Cf. for instance, J. Thomason, Secy, NWP Govt, to Regr NA, Allahabad, 27 November 1840, Home Judl, 21 December 1840, No. 9, NAI.

¹⁴² Reg 17 of 1816 indicates that the mobilization of convict labour under police superintendence was crucial to the building of public works in this period. It vested the Superintendent of Police with a general control over public bridges, serais and *katras*, and over the allocation of convict labour to various works. Cf. magistrates to SP on the employment of convict labour on public works, 15 May 1816, No. 31, Appendix E, PP, 1819, vol. 13, pp. 236-9. *Katras*: markets.

for all-weather roads linking the Presidency towns,¹⁴³ and continued to do so despite the great expense of the frontier wars from 1838.¹⁴⁴ The Lieutenant Governor of the North Western Provinces argued that a Grand Trunk road from Calcutta to Delhi would assist in the administrative integration of the North Western Provinces and hold advantages for trade, communications and military mobility.¹⁴⁵ But there was also a strong ideological attraction in this period towards vesting British rule with the glory of ambitious public works, ones which would rival the record of the Mughals in this matter.¹⁴⁶ In the late eighteenth century similar proposals to put convict gangs on roads at a great distance from their district jails had been rejected on the grounds of expense.¹⁴⁷

¹⁴³ Cf. CCL on the importance of the 'grand communications' on which convict gangs were engaged for trade and troop movement. CCL to GG Auckland, 6 June 1836, Home Judl Cr, 27 March 1837, No. 2, NAI. Earlier a more diverse range of works of 'public utility' had been undertaken.

¹⁴⁴ Cf. Lt. Col. W.H. Sykes, 'Expenditure in India on public works from 1837-8 to 1845-6, inclusive', JSSL, 1851, pp. 45-7 defending the record of the Indian government on public works despite expensive frontier wars. He also pointed to the expenditure incurred by the judicial department on convict labour for public works.

¹⁴⁵ Cf. Narrative of progs of NWP Govt, second quarter of 1840, Home Misc No. 488, 1840-41, NAI.

¹⁴⁶ H.H. Spry, medical officer at Sagar, expressed the common contention that British government had neglected public works and suggested that convicts complete the road from Mirzapur to Jabbalpur. *Modern India*, I, pp. 14-15, II, pp. 295-302. 'Our rule has been distinguished by building large Prisons; and the contrast with the Mughal Emperors, in respect of public works is not to our advantage.' Hardinge to Hobhouse, 3 January 1847, cited in Blair King, *Partner in empire*, 1981, p. 70. After Dalhousie the tone altered with the 'Mohammedan system' of spending on monuments and on objects of luxury being compared with British expenditure on 'useful' public works. Cf. JSSL, vol. 21, 1858. During the rebellion of 1857-58, the Begum of Awadh challenged this claim to beneficence: 'In this Proclamation (that is, Queen Victoria's) it is written that when peace is restored, public works, such as roads and Canals will be made in order to improve the condition of the people. It is worthy of a little reflection, that they have promised no better employment for Hindoostanees than making roads and digging Canals.' Foreign Pol. Cons, 17 December 1858, Nos 250-4, p. 14, NAI.

¹⁴⁷ Cf. BCJ, 8 May 1797, No. 18, pp. 129-30; Progs of Vice President in Council, 5 January 1798, Mirzapur Collectorate, PMJ, Basta 7, Series v, vol. 44, 1798-1802, RAA. Interestingly, in this earlier period, we do not come across the argument that such distant projects removed the disciplinary constraints of the jail.

But in 1833, with a different attitude to such schemes, the government sanctioned a proposal to draft prisoners from the district jails and put them to work on the Grand Trunk road between Calcutta and Banaras under the supervision of army engineers. An influential argument in favour of this project was that these engineers, designated executive officers and Superintendents of Public Works, would be able to exact labour more rigorously than the overburdened magistrate, and that this labour would be applied to work of the greatest utility.¹⁴⁸ The Court of Directors had taken a discouraging line on Bentinck's ambitious schemes for communications, insisting that the question of expense had to be kept at the forefront.¹⁴⁹ In response the Indian government argued that the judicial department had always met the cost of prisoner maintenance and of their district projects.¹⁵⁰ The other way of building these roads would have been to hire labour under the contract system, as suggested by the Committee for Prison Discipline.¹⁵¹ But many officers believed that such a pool of labour was not easily available, and that the withdrawal of prisoners would mean the suspension of the Trunk road.¹⁵² A contemporary *Handbook for India* gave an enthusiastic description of large convict gangs on 'the new grand military line of road from Calcutta to Loodiana' working 'with all the regularity of a regiment of soldiers

¹⁴⁸ Military Board to GG in C, 2 December 1834, in letter to COD, Home Judl, 1836, NAI; CCL to GG Auckland, 14 March 1837, para 45, Home Judl Cr, 27 March 1837, No. 2, NAI. Also Shore, *Notes*, II, p. 375.

¹⁴⁹ Cf. J.G. Ravenshaw, Chairman COD, to Bentinck, 7 December 1833, *CLWCB*, II, letter no. 645, p. 1156.

¹⁵⁰ Cf. Military Board to GG in C, 2 December 1834, cited in letter to COD, Home Judl 1836, NAI. However the Court of Directors insisted that the expense of convict labour should be included in all cost estimates for public works. COD to Public Dept, 26 June 1839, in *COSFA*, 28 April 1840, No. 205, p. 110.

¹⁵¹ *CPD*, para 129.

¹⁵² Perhaps a larger project demanded a predictable pool of cheap labour, available the year round; not one eroded periodically by the fluctuations of the agricultural cycle. Convict labour may have been the cheapest way of ensuring this steady number. In addition it could be sent to the most remote and inhospitable tracts. The droughts of the 1830s supplemented this pool of labour for public works. Some stray reports indicate the difficulty in more normal circumstances of hiring cheap labour for such works, and the reliance upon zamindar-darogha coercion to obtain it when necessary. For examples, see letter to COD, 12 October 1835, No. 15, paras 68-71, Home Judl, 1834-35, NAI.

manoeuvring, letting all their battering rams fall at the same time, with a noise like thunder.'¹⁵³

The executive officers had been given magisterial powers over prisoners,¹⁵⁴ but the Committee for Prison Discipline complained that their priority was not penal discipline but getting the maximum work and meeting targets for which they would offer prohibited 'indulgences'.¹⁵⁵ However, the factor which forced a re-assessment of the scheme was the incidence of sickness and mortality among such work gangs, particularly in certain districts of the Bengal Presidency. It is in the discussion of statistics of sickness and mortality among prisoners that one can discern the ideological shifts in penal policy even though outdoor labour continued to dominate the work regime. There was evidence of another sort of the physical suffering of the work gangs on certain stretches of the Grand Trunk road, in reports of prisoners trying to disable themselves by rubbing plant juices on their eyes or chewing leaves to induce sickness.¹⁵⁶ But this kind of resistance merely evoked harsher disciplinary measures.¹⁵⁷ What could not be overlooked however were the statistical returns of sickness and mortality among prisoners and the embarrassing contrast they offered with another set of statistics, that of sickness and mortality among Indian troops.¹⁵⁸ Some magistrates had also reported that convicts sent to the Grand Trunk road were returned to the jail hospital with diseases 'of the most malignant kind'.¹⁵⁹

¹⁵³ G. Parbury, *Handbook for India and Egypt*, 1841, p. 78.

¹⁵⁴ Act II, 1835. The executive officer could discipline his convict work force by putting handcuffs, or extra irons, reducing their rations or allowance, and flogging.

¹⁵⁵ *CPD*, paras 117, 132.

¹⁵⁶ Cf. reports from the Ramgarh stretch of the Trunk road where the mortality rate was very high. CCL to GG Auckland, 6 June 1836, Home Judl Cr, 27 March 1837, No. 2, NAI.

¹⁵⁷ Cf. CONA, 11 May 1838, stating that a prisoner disabling himself for labour was punishable for breach of jail discipline. H.C. Tucker, *My note book*, 1848, p. 414. The jail regulation of 1816 had only conceived of the possibility of a prisoner refusing to work. The circular of 1838 hints at prisoner response to a harsher regime of labour.

¹⁵⁸ On 8 December 1833 the Medical Board issued a circular pointing out that the difference between convict mortality and sepoy mortality was so striking that measures were required to reduce it. Superintending Surgeons were asked to send a statement on jail mortality for the last five years. J. Hutchinson, *Observations*, 1845, pp. 9-11.

¹⁵⁹ F. Currie, Commr Banaras, to Secy Judl Dept, 16 April 1836, Home Judl, 27 February 1837, No. 9, NAI.

Reluctant to recall the work gangs, the Bengal government appointed a committee in 1836 to examine the conditions of convict labour in that presidency, 'according as they relate, first to the claim of humanity; second to objects of public improvement; and third, to the economical application of the means of the state.'¹⁶⁰ The committee took an equivocating position.¹⁶¹ It admitted that indoor work could be made the best form of using convict labour, but that in the absence of a good system of prison discipline, prisoners might be left with the executive officers. However old and infirm prisoners should be weeded out and better arrangements made for food, lodging and medical attention.¹⁶² Alarmed by a spurt in mortality among the work gangs in the period July–December 1836 the Bengal Government abandoned the scheme, with reluctance, but stating that it could not be maintained, 'consistently with a due regard for humanity.'¹⁶³ The four thousand prisoners working under Captain Thompson on the Burdwan-Banaras stretch of the Grand Trunk road were sent back to their district jails.¹⁶⁴ Though the Supreme Government endorsed the decision to withdraw convict labour from the executive officers, the Lt Governor of the North Western Provinces put prisoners back onto the Grand Trunk Road, but under the control of magistrates and in their own districts. His explanation was that, 'in the present state of the country, an adequate supply of free labour could not be procured with certainty.'¹⁶⁵ But in Bengal the magistrates were instructed not to assign prisoners to projects

¹⁶⁰ CCL to GG, 14 March 1837, para 2, Home Judl Cr, 27 March 1837, No. 2, NAI.

¹⁶¹ It compared the rate of mortality of prisoners in jail with those living and working on the roads and concluded that the excess in mortality of the latter was less than 3 per cent. *Ibid.*, para 27.

¹⁶² *Ibid.*

¹⁶³ Resoln, Judl Dept, 14 March 1837, Home Judl Cr, 27 March 1837, No. 3, NAI.

¹⁶⁴ CPD, para 114. However, this was but a small proportion of the thirteen thousand prisoners detailed to military engineers. Prisoners working in Cuttack and elsewhere under these officers in their own or adjacent districts were kept on the roads. *Ibid.*

¹⁶⁵ Narrative of prog of NWP Govt, 2nd quarter of 1840, Home Misc, No. 488, 1840–41, NAI, pp. 72–3. The supreme government accepted this arrangement though it deviated from the policy it had adopted. Secy, Judl Dept, GOI, to J. Thomason, Secy to Lt Gov, NWP, 27 July 1840, Home Judl, C, 27 July 1840, No. 15, NAI.

which would prevent their return to the jail at night.¹⁶⁶ Outdoor labour linked to a jail routine could be justified with the argument that the magistrate would oversee the prisoners' health and that it met the disciplinary objective.¹⁶⁷ However the position that public labour was unsuitable for petty offenders and for those convicted of misdemeanours such as affray found expression in Regulation 2 of 1834. This outlined cases in which the penalty of imprisonment with labour could be commuted to imprisonment with a fine.¹⁶⁸

In the matter of indoor labour the Prison Discipline Committee's objections to 'useful trades and crafts' did not find much support.¹⁶⁹ Whatever their cynicism about being able to tap the moral springs of Indian society, many officials argued that work regimes of the industrial prototype, combining profitable labour with constant employment might reform the 'unproductive consumer'.¹⁷⁰ The treadmill, introduced in British prisons from 1818, had aroused great interest with officials much before its endorsement by the Prison Discipline Committee.¹⁷¹ A civil engineer

¹⁶⁶ Magistrates constantly tried to stretch the limits of this prohibition. In 1845 eleven magistrates applied for permission to retain convicts on public works at a distance from the district headquarters. Cf. Govt of Bengal to COD, 4 November 1845, Judl narrative for the second qr of 1845, Letters to COD, vol. 26, pp. 315–16, WBSA.

¹⁶⁷ Sending prisoners to work at a great distance 'would militate greatly against the improvement of jail discipline, an object of vast political importance.' *Ibid.*, para 2.

¹⁶⁸ In 1831 the Nizam Adalat had recommended that prisoners convicted for crimes not considered ignominious, should be sentenced to imprisonment without labour and a fine. Cf. GOI to COD, 12 October 1835, Judl and Revenue Dept, 1835, letters to COD, 1834–35, NAI, and Reg 2, s 3, cl 1, 1834.

¹⁶⁹ Cf. Magt Gorakhpur to Commr, 14 February 1843, arguing that interest in work benefitted prisoner health and discipline. Also 'Prison discipline in India', *Calcutta review*, July–December 1846, p. 485, and F.J. Mouat, 'On prison statistics and discipline in Lower Bengal', *JSSL*, June 1862, xxx, pp. 175–218, for opinion in favour of useful trades.

¹⁷⁰ F.J. Mouat, 'On prison statistics', pp. 207, 211, 217.

¹⁷¹ The CPD had recommended the treadmill as a machine which would render labour 'dull wearisome and disgusting', force every individual to exert himself equally and constantly, and prevent partiality on the part of the overseer. CPD, paras 250–2. Cf. Judl Dept, vol. 46/55, 1821–22, MSA for early efforts in the Bombay Presidency to design a treadmill on the model of the one in Brixton prison.

consulted by the Bombay government on the construction of a treadmill summed up the aspiration:

The most essential application of ingenuity and invention, seems to be required in giving to the machinery a power to control the persons employed upon it or of regulating and registering their actual performance without a dependance upon the veracity of the overseer . . .¹⁷²

But the indigenisation of this penal device seems to have foundered on the backwardness of machine tool technology in the colony.¹⁷³ Thus the Government of the North Western Provinces kept sanctioning sums for the setting up of a treadwheel in Farukhabad jail from 1832 till 1839 but the contraption had to be discarded because of defects in its construction.¹⁷⁴ In a further episode of the treadwheel saga a model was sent out from England in 1842 and put up in the House of Correction in Calcutta but without the machinery to put the power to any use.¹⁷⁵ A cornmill set up in Allahabad was unsatisfactory because 'the cogs not being made with mathematical nicety were constantly breaking' and the production was very inadequate to the labour expended.¹⁷⁶ The treadwheel was also susceptible to prisoner sabotage.¹⁷⁷ Ultimately it was the hand mill for grinding wheat which provided an enduring device for hard indoor labour, dovetailing nicely with the substitution of rations for money and supported by the argument

¹⁷² D. West to Secy Judl Dept, Bombay, 1 June 1823, Judl Dept, vol. 46/55, 1821-22, p. 714, MSA.

¹⁷³ Cruder forms of the treadwheel were more successful.

¹⁷⁴ As the mechanical arrangements of a treadwheel were 'one of the nicest operations of practical engineering', Executive officer Boileau suggested that the machinery be cast at the government foundry in Calcutta instead of being made on the spot. For correspondence on the ill-fated Farukhabad treadwheel see Home Judl Cr, 11 January 1838, No. 2, NAI, and Home Judl Civil, A, 30 December 1839, No. 12, NAI.

¹⁷⁵ Offg Secy, GOI Mily Dept, to Secy Bengal Govt, Judl Dept, 17 June 1842, Bengal Judl Progs, 5 September 1842, No. 1, WBSA. A sum of Rs 9674.12 annas was sanctioned for completing the machinery and constructing a shed. Govt of Bengal to COD, 10 January 1845, Judl, 10 January-4 November 1845, letters to COD, vol. 26, WBSA.

¹⁷⁶ T.P. Woodcock, Magt Allahabad, to SJ Allahabad, 1 June 1844, Home Judl, 12 October 1844, No. 16, NAI.

¹⁷⁷ H.C. Tucker noted that the machinery was very liable to go out of order, 'accidentally or wilfully'; and recommended 'the common bazaar grindstone' instead. *My notebook*, p. 211.

that this flour would be better for the prisoners' health.¹⁷⁸ It was especially useful in providing labour for prisoners sentenced to life who could not be sent outdoors. The jail riots of 1842 in Bareilly and Banaras were attributed to their opposition to this intensification of indoor work.¹⁷⁹ But some medical correspondence also suggests that prisoner rations were inadequate to the increase in labour.¹⁸⁰ The hand mill also provided indoor work for women sentenced to hard labour. The focus on indoor labour probably increased the disciplinary constraints on women prisoners and the labour demanded from them.¹⁸¹

¹⁷⁸ CONA, WP, 2 July 1841, in *Circular orders*, appendix, p. xlv. Handmills were allotted to prisoners in solitary confinement in the Calcutta jail and to life prisoners in the jails at Bareilly, Banaras Allahabad, Hamirpur, and Farukhabad. Chief Magt Calcutta to Secy Bengal Govt, 5 October 1839, Leg Cons, A, 11 May 1840, Nos 7-12, NAI; CONA, 20 July 1841, No. 855, in Medical Board progs (MB), 12 January 1843, No. 22, NAI. Work at the handmills was also used as a punishment for breach of jail discipline. *Report on the management of the jails from 1845-51*, Agra, 1852, p. 136. *Chakki peesna*, came to be strongly associated with the rigours of imprisonment in India. Cf. C.A. Bayly, *An illustrated history of modern India*, 1991, p. 137, fig. 19, for a portrait of Indian prisoners grinding corn.

¹⁷⁹ Handmills had been introduced to Banaras jail in 1843 for prisoners sentenced for life. When the magistrate raised the task from 5 sers to 8, the prisoners first starved themselves, then attacked the jail darogha with the handles of their mills and their *lotab*, brass drinking vessels. The magistrate attributed the outbreak to the prisoners' contention that as they were sentenced for life, they were excused from labour. Actg Magt Banaras to SJ, Banaras, 30 November 1842, Banaras collectorate, PMJ, vol. 12, letters issued by Magt, 12 September 1842-31 May 1843, RAA. Magt Bareilly to Commr Rohilkhand, 8 December 1842, Home Judl, 20 January 1843, NAI. The Lt Governor of the NWP, with a eye perhaps to road building projects, said indoor labour seemed to provoke violent attacks and should not be introduced without precautions. Letter to COD, 2 September 1843, Home Judl, letters to COD, 1842-4, NAI.

¹⁸⁰ The Civil Surgeon at Bareilly, J.M. Brander, felt that the rations were insufficient especially since labour had increased. He was also critical of the physical effects of nine hours at the hand mills. J.M. Brander to Magt Bareilly, 18 July 1842, and to J. Atkinson, Suptg Surgeon, Meerut Division, 31 December 1842, MB, 26 January 1843, No. 21, NAI.

¹⁸¹ Cf. T.P. Woodcock, Magt Allahabad to SJ, 1 June 1844, Home Judl, 12 October 1844, NAI reporting that women prisoners had too much freedom and too little labour, and that he had increased their task work at the hand mills from 7.5 sers of wheat to 12. Perhaps these figures refer to the amounts ground by women working in pairs.

Statistics and the Medical Professional

Indoor labour did play a larger role in the central penitentiaries which began to be instituted on an experimental basis from the 1840s and the 1850s.¹⁸² The government's increasing demand for statements on jail expenditure, the value of work done by prisoners, and on sickness and mortality indicates its focus on imprisonment as the pre-eminent mode of punishment. Statistical information was supposed to provide the factual basis for uniform policies to improve discipline, economy and health in jails.¹⁸³ Such rules it was hoped would curb the discretionary powers of jail officials but also check slack regimes which gave too much licence to prisoners. However medical statistics also implied that improvements in jail discipline and economy notwithstanding, the prisoner's health had to be maintained. High figures for sickness and mortality tainted the jail regime with the aura of indiscriminate and unequal suffering.¹⁸⁴

The Company's penal regime incorporated very early on and without much discussion the idea that prisoners should be given

¹⁸² A central jail was set up in Agra in 1846, and in 1848 the prisons at Allahabad and Bareilly were made into central jails. In addition, there were abortive attempts to set up central penitentiaries at Hazaribagh and Deegah. Cf. A. Howell, *Note on jails and jail discipline in India, 1867-68*, p. 7.

¹⁸³ Cf. CONA, 24 July 1829, asking for information on jail expenditure and income and for suggestions on improving discipline with a view to the reform of the offender, the decrease of expenditure, and 'the more beneficial application' of his labour. Letters to COD, 1834-35, p. 211, NAI. In 1842 the Court of Directors called for statistical information on prisoner mortality so that it could 'form the groundwork of an improved system of management.' COSFA, No 282, 13 June 1843, pp. 9-11. In the Madras Presidency better jail accounts were constantly demanded in the 1830s. Cf. COFA, 19 January 1831, 29 August 1831, 30 December 1833-A, pp. 143, 151, 181, 196. The lithographic press facilitated the supply of forms for data collection. H.T. Bernstein, *Steamboats on the Ganges*, 1960, p. 184, refers to whole cases of forms being sent to various offices from the Government Lithographic office in Calcutta.

¹⁸⁴ The Court of Directors instructed magistrates to prevent dangerous overcrowding: 'Every pain he inflicts on those persons (i.e. prisoners) beyond that which is required by Law is illegal punishment.' Letter from COD, 14 April 1830, in CONA, No. 68, 17 December 1830, p. 137. One of the objections of the Committee for Prison Discipline to prisoner work-gangs under engineer officers, was that the chances of death were so much increased, that a secondary punishment was converted into capital punishment. CPD, paras 112, 134.

some medical facilities.¹⁸⁵ The reports of circuit judges in the 1790s suggest they thought the prisoners were quite healthy.¹⁸⁶ Prisoner sickness and mortality seems to be recognized as a significant 'problem' in the discussion of punishment in the 1830s when the collection of statistics facilitated a comparison between the health of prisoners and Company sipahis.¹⁸⁷ More importantly, such statistics allowed a comparison of the percentages of sickness and mortality between jails, and between various classes of prisoners.¹⁸⁸

In the first issue of its journal, the Statistical Society of London, which also had a small group of correspondents in India, claimed that the science of statistics was different from that of Political

¹⁸⁵ The jail establishment bore the charges for a *tabib*, a native doctor, along with charges for the agents of death and corporal pain, the *jallaad* and the *tazianabardar*, or *korabardar*. Medical assistance was one of those features which distinguished imprisonment conceived of as a fixed term from its status as a penal strategy under pre-colonial regimes. In the latter, confinement was usually an expedient for putting pressure on the prisoner to find a surety for the payment of revenue arrears, a fine, or the value of stolen property. The emphasis therefore was on piling up physical discomfort and deprivation. A magistrate of Bakarganj reported that when questioned on prisoner welfare his darogha said severe treatment and the denial of comforts such as shaving and washing was the right treatment for them. BRC P/52/22, 3 December 1790, p. 310.

¹⁸⁶ Cf. Actg Dy Regr NA to GG in C, 19 April 1797, BCrJ 8 June 1797, No. 8, p. 128, WBSA. Bishop Heber who visited various Company jails in 1824 described them as generally clean, airy and well managed. R. Heber, *Narrative of a journey*, 1843, p. 153.

¹⁸⁷ In his pioneering book, *Colonizing the body*, 1993, David Arnold has examined the prison dimension of colonial medicine. But I would qualify his assertion that in the 1830s and 1840s judges and magistrates thought that improving conditions for health ran counter to the concern to make prisons more deterrent, *ibid.*, p. 99. This period was important to the recognition of prison mortality as a problem of Indian jail administration.

¹⁸⁸ In 1814 surgeons had to submit a quarterly statement of sickness and mortality in jails to the Medical Board. In 1822 magistrates were asked for monthly abstract statements of deaths in jail with an explanation whenever the number exceeded 5, cf. *Circular orders*, appendix, No. 132, p. vi, No. 267, p. xxvi. But medical returns assumed a special significance when percentages of prisoner sickness and mortality to total strength were compiled and compared. In 1835 the Medical Board of the Bengal Presidency submitted its first comprehensive statement showing the *ratio* of sickness and mortality to the total strength of prisoners in Agra and Bengal for 1834. Letters to COD, 3 March 1836, No. 3, Judl Dept, 1836, p. 45, para 35, NAI. Cf. also CONA, No. 187, 24 December 1835, p. 192 asking Civil Surgeons and Magistrates to submit explanations whenever prisoner deaths exceeded 1% per annum.

Economy because it did not discuss causes or effects. It sought only 'to collect, arrange, and compare, that class of facts which alone can form the basis of correct conclusions with respect to social and political government.'¹⁸⁹ In fact, in the 1830s and 1840s the medical officers in India often found it difficult to arrive at confident conclusions from the statistics of convict sickness and mortality. And politics were not so easily vanquished by 'science' for even when the statistical data suggested that the shift to rations or cooked food had increased sickness in some prisons, the government did not reverse its policy. Instead the reform outlook fostered two decades or more of experimentation with the prison dietary. In the process the medical officer was increasingly called upon to provide the professional opinion which would validate the humanity of this more rigorous regime.¹⁹⁰ The role of medical statistics and of the medical professional in buttressing or modifying arguments about discipline and economy took shape in debates over the quantity and composition of the jail diet, and the quantum of labour.

What emerges very clearly from these debates is that the medical officers felt they were called upon to discuss questions of health within an agenda to improve prison discipline.¹⁹¹ In investigating sickness and mortality among prisoners on the Grand Trunk road,

¹⁸⁹ Introduction, *JSSL*, vol. 1, London, 1839, p. 1. C.R. Barwell of the Bengal police committee expressed a similar optimism about statistical returns as the basis for reform policy. *Committee on the mofussil police*, 1838. Patricia O'Brien points out that the social sciences were important validating mechanisms in penal reform. A 'scientific' approach to punishment lay behind the notion of rehabilitation in the controlled environment of the prisons. She argues that this discourse of reform indicated the entry of a new social group, the bourgeoisie, into the penal process. Patricia O'Brien, *The promise of punishment*, 1982, p. 10.

¹⁹⁰ There are indications that medical officers wanted more than just a legitimating role. Individuals such as J. Hutchinson, Secretary of the Medical Board and later F.J. Mouat, appointed Inspector General of Jails in the Bengal Presidency in 1855, demanded a greater role for the medical profession in the actual formulation of penal policy. They used statistical information to reinforce their claims. See D. Arnold, *Colonizing the body*, pp. 71-2, for a similar argument. A comparison between the first and second edition of Hutchinson's book, *Observations*, shows the expansion of his agenda.

¹⁹¹ In the second edition of *Observations* Hutchinson added chapters on the 'Prevention of crime' and the 'Theory of punishment'. *Observations*, 1845, p. vii. Weiner has commented on the disciplinary face of Victorian public medicine. *Reconstructing the criminal*, pp. 122-3.

three medical officers seemed to support the prisoners' complaints about bad food against the opinion of the military superintendents.¹⁹² But the other current in their argument was that prisoners had to be prevented from 'making themselves sick', through a shift from cash allowances to fixed rations or cooked food.¹⁹³ A vivid sense of the kind of pleasures and comforts the prisoners tried to wring out of their allowance emerges from the descriptions which medical officers gave of their habits: how they 'made themselves sick' by saving portions of their food during the week day and gorging on Sunday,¹⁹⁴ and by their purchases of 'bad meat, stinking Fish, musty grain, unripe vegetables and fruit as well as the most deleterious spirits and Drugs.'¹⁹⁵ Some medical officers also stressed the disciplinary advantages of the shift, pointing out that it would prevent the prisoner from obtaining 'prohibited indulgences' or bribing the guards and native doctor for some rest from labour.¹⁹⁶ The imperatives of health and those of discipline exercised a contrary pull only over the more specific question of the quantity and composition of the diet once the prisoner's choice had been eliminated.

In 1839 the money allowance was replaced by rations,¹⁹⁷ and the medical officer began to be called upon to determine a diet which would maintain the native in health while serving a disciplinary

¹⁹² CCL to GG Auckland, 6 June 1836, Home Judl Cr, 27 March 1837, No. 2, para 23, NAI.

¹⁹³ Cf. for instance the comments of Dr Woodberry, and Dr Bell. CCL to GG Auckland, 6 June 1836, para 23, *ibid*.

¹⁹⁴ *Ibid*.

¹⁹⁵ Suptg Surgeon Neemuch to J. Hutchinson, Secy, Medical Board, 27 December 1842, MB 12 January 1843, No. 22, NAI.

¹⁹⁶ Hutchinson for instance recommended cooked rations both for health and its disciplinary advantages. *Observations*, 1845, pp. 47-52. Cf. J. Murray, Asst Surgeon Birbhum to W. Tindon, Suptg Surgeon Barrackpur, 15 December 1842 on the disciplinary advantages of messing. MB, 5 January 1843, No. 19, NAI.

¹⁹⁷ The standard was fixed as a certain quantity of rice in Bengal and of flour in the North Western Provinces. This quantity was to be maintained irrespective of price fluctuations as government said it undertook to keep the prisoners in health and fit for labour, without reference to the market. Within these guidelines magistrates were instructed to give such rations as were 'discreet, humane and within the limits of a just economy'. Orders of 11 December 1838 in the Agra Presidency and of 9 April 1839 in the Bengal Presidency, Leg Cons, A, 14 October 1839, No. 2, NAI.

purpose.¹⁹⁸ The introduction of cooked food from 1841 sharpened this pressure for medical intervention.¹⁹⁹ One instance of this followed from an order of 20 July 1841 in the North Western Provinces, which reduced the standard allowance of 16 *chataks* of wheat to 12 *chataks*, and prohibited the exchange of flour for other items to force down the margin of any 'surplus' which prisoners might barter for prohibited 'indulgences'.²⁰⁰ Medical officers discovered that this reduction in quantity, accompanied sometimes by an increase in labour, was affecting prisoner health. Some medical officers now admitted that the money system had preserved a variety in diet, and Keane at Murshidabad and Brander at Bareilly even recommended a reversion to it.²⁰¹ In Tirhut the Civil Surgeon attributed an increase in mortality to a diet of 'too much sameness' and to too much labour, in other words to the 'perfection' of the magistrate's jail discipline.²⁰² Medical officers began to urge increased rations for labouring prisoners, variation in diet, and two cooked meals a day, instead of one.²⁰³ Though some magistrates objected to two cooked meals as a luxury, government deferred to medical opinion on the issue.²⁰⁴

¹⁹⁸ The Government of the North Western Provinces reported that officers favoured the ration system for its disciplinary advantages, but that medical men would have to monitor its effects on health, because Europeans could not judge the native diet. Resoln, Judl Dept, NWP, 11 September 1840, Home Judl, A, 5 October 1840, No. 10, NAI.

¹⁹⁹ Cf. CONA, 9 July 1841, for Bengal and CONA, 20 July 1841, for the NWP.

²⁰⁰ CONA, 20 July 1841, No. 855, in MB, 12 January 1843, No. 22, NAI. The allowance of 12 *chataks* included 2 *chataks* of pulses. *Chatak*: a unit of weight.

²⁰¹ A. Keane to Magt Murshidabad, 13 September 1842, and J.M. Brander, Civil Surgeon Bareilly to Suptg Surgeon, Meerut Divn, 31 December 1842, MB, 26 January 1843, Nos 13 and 21, NAI.

²⁰² H. Mackinnon to Magt Tirhut, 12 August 1842, Bengal Judl Progs, 5 June 1843, No. 49, WBSA.

²⁰³ Cf. MB, 5 January 1843, No 19, 6 February 1843, Nos 11 and 23, May 1843, No. 13, NAI. The Medical Board reported that their officers 'infinitely preferred' the ration system to money allowances but that in some districts the scale was too low leading to a 'scorbutic' tendency. It recommended two cooked meals. MB to W.W. Bird, President in Council, 31 March 1843, No. 127, Bengal Judl Progs, 5 June 1843, No. 127, WBSA.

²⁰⁴ Government also authorized the magistrates, in consultation with the civil surgeon, to increase the rations in certain cases. Secy, NWP Govt to NA, 31 December 1842, MB, 6 February 1843, No. 11, NAI. Resoln on the messing system in the LP, 15 June 1843, Home Judl, 21 June 1843, No. 11,

The Committee for Prison Discipline had not supposed that there would be any great problem in determining a penal diet. They admitted it was difficult in India to keep a prisoner in health without making his diet better than that of his 'honest neighbours', and recognized that some variety might be necessary for health.²⁰⁵ Yet they did not anticipate the degree of difference which would have to be accepted between the diet of the mythical honest labourer and that of the prisoner. Dr Hutchinson, Secretary of the Medical Board, chose a harsher paragraph on prison diet from this report, the better to castigate it.²⁰⁶ But since he also claimed the credit for suggesting cooked food, he brushed away any uncertainties over health and the resistance of prisoners.²⁰⁷

The substitution of cooked food for money or rations, efforts to exact labour more rigorously, and schemes for central penitentiaries, began to raise questions regarding health which indicated the complexity of the arrangements necessary for penal reform. Epidemic disease and high mortality could well jeopardize such schemes, and threaten the health of the surrounding population. The medical officer seemed to be the person most qualified to assume responsibility. Periodically some officials would imply that the medical angle had diluted the disciplinary imperative to too great a degree, so medical officers had to demonstrate their appreciation of that angle as well. However, assertive spokesmen for their profession, such as F.J. Mouat, could give short shrift to critics. A magistrate who objected to the *ghæe* allowance for prisoners as it was a luxury, 'and was much ridiculed all over the country by both Natives and Europeans' was given a withering rejoinder:

NAI. For the introduction of two meals see CONA, 23 June 1843, No. 139, in H.C. Tucker, *My note book*, p. 411. In Bengal the standard for labouring prisoners was increased from one ser of rice to one and a half sers, CONA, 1 September 1843, in T.K. Banerjee, *Background to Indian criminal law*, Calcutta, 1963, p. 338.

²⁰⁵ However, the prisoner should be given only the coarsest grain on which the mass of people lived, and tobacco only on medical recommendation. *CPD*, paras 57-8, 74, 61.

²⁰⁶ That is, *CPD*, para 79. Hutchinson asserted that a prisoner required a more generous diet to keep him in health than a man who did not suffer from mental distress and depression and could enjoy a change of air and season. *Observations*, 1845, p. 61.

²⁰⁷ '[T]hough slight differences opposed themselves in some districts, the general feeling soon became, that a great change had been effected for the better.' *Ibid.*, p. 54.

It would be idle for me to discuss with you the physiological grounds which render it essential for the health of human beings that various principles necessary for the wear and tear of the tissues should be introduced into their systems. I could not explain them so as to be intelligible to a person unacquainted with Chemistry, Anatomy and Physiology. . . . The real question then is a purely professional question.²⁰⁸

Ironically, health as the mark of humanity was also cited by a cost-cutting government as a reason for going slow on changes.²⁰⁹ The Court of Directors warned against ambitious and expensive schemes for central penitentiaries, citing apprehensions about keeping prisoners in cells in a tropical climate, or concentrating them in large numbers at the risk of epidemics.²¹⁰

Benevolent Rule and the Terms of Penal Distinction

In this concluding and more exploratory section of the chapter I want to approach the riots against messing in the 1840s from two angles: the terms on which prisoners addressed their claims to government and justified their protests; and as a significant moment in the assertion of new terms of authority by the colonial state. In the rhetoric of prisoner resistance to disciplinary measures, a crucial reference point was the government's claim to legitimacy grounded on non-interference in caste and religion. Prisoners used this normative terrain to resist certain changes in the jail regime and to address an appeal about their plight to society. In using such forms of appeal and resistance prisoners were in fact denying their difference from the rest of society.²¹¹

²⁰⁸ F.J. Mouat, *Reports on jails visited*, 1856, pp. 105–6. *Ghee*: clarified butter.

²⁰⁹ 'The enhancement of severity of punishment in this country,' wrote the Secretary of the Home Department, 'is so closely connected with considerations of humanity that the process must always be gradual and will require to be carefully watched.' Here the Home Department may have been trying to explain the delay in altering jails according to the recommendations of the Committee for Prison Discipline. Secy Home Dept to Colonial Secy, Colombo, 21 October 1843, Home Judl, C, 21 October 1843, No. 9, NAI.

²¹⁰ Cf. COD to Bengal Govt, 16 April 1845, Nos 8 and 28, April 1846, No. 12, pp. 431, 153–5, in General letters from the COD, Judl, 22 January 1845–15 December 1847, vol. 62, WBSA.

²¹¹ Prisoners also sought better treatment in terms which implied a recognition of their special situation, but which invoked the principle of judicial inspection and a rule governed administration. In the aftermath of the firing

There are indications that another way in which they did so was by comparing their claims on the state to those of labourers on their patrons and employers. The importance of convict labour to the municipal contours of colonial towns, and the magistrate's concern to get as much work as he could from his jail gang meant prisoners did have a small margin for negotiation. While government repeatedly insisted that profit was not the goal of penal labour, it urged its most economical utilization. So perhaps even work-gangs weighed down with fetters which ulcerated their limbs, could negotiate for some lightening of conditions, some overlooking of rules, some rewards in food or tobacco for the completion of a particular project. The Prison Discipline Committee criticized the military superintendents for speeding the completion of public works by such 'indulgences'.²¹² The Committee had also been very critical of a money allowance to prisoners — it 'assimilates in its character too nearly to the payment of wages to honest work people'.²¹³ Certainly in the early prison regime, the prisoner had considerable autonomy in the disposal of this amount. As I pointed out earlier, the prisoner's family often gathered around the jail or at the spot where he worked, and met him during the day,²¹⁴ so he could stint himself to help his dependants. Rumours about prisoners hoarding their pice, giving them to their families, or spending them on liquor, drugs and tobacco, reinforced the official cliché that imprisonment was no hardship for men who laboured for their livelihood, or that prisoners were given more than what was necessary for survival. Officials frequently asserted that Indians held the whole jail idea in ridicule and that they commended the more summary and corporal punishments of pre-colonial regimes such as whipping or mutilation. 'The Company's *donkatus* (thieves) look better than bridegrooms is a common saying in Cuddapah' reported

on prisoners of Deegah penitentiary in 1845 some prisoners and their relatives addressed petitions to the Sessions Judge asking him to investigate the magistrate's conduct. These petitions were probably drafted by someone familiar with the courts. But such expectations of judicial enquiry were belied, for government backed the magistrates in the force used. Cf. BC F/4/2147, No. 102784.

²¹² CPD, p. 59, para 132.

²¹³ CPD, p. 32, para 60.

²¹⁴ Valentia, *Voyages*, 1809, p. 83.

Heynes, a Company surgeon, in 1809.²¹⁵ Yet, he also had to concede that a smaller allowance could hardly be given; the daily quota of one *ser* of the cheapest grain and one *dub*, a copper coin, was what Tipu Sultan and other Indian princes had allowed both to prisoners of war and felons.²¹⁶ I am not implying that the conditions of convict labour were no different from ordinary labour or that their allowance, or freedom to dispose of it, could be compared with wages. But the money allowance and outdoor labour set a particular context for the prisoners' claims that they were *sarkar ke naukars*.²¹⁷ Officials sometimes missed the irony of such terms. They solemnly explained the prisoners' reference to the jail as their *sasural*, father-in-law's house, as 'a term expressive of good fare and accommodation'.²¹⁸ But epithets such as *sarkar ka naukars* also suggested that prisoners claimed a value for their labour beyond that of the penal. In his inspection of Purnia jail

²¹⁵ Heynes, *Tracts*, London, 1814, p. 322.

²¹⁶ *Ibid.*, p. 323. *Ser*: a unit of weight.

²¹⁷ Cf. minute of F.C. Smith, SP, LP, 30 April 1838, complaining that imprisonment held no terrors for the 'lower classes' in India. They consider 'that they are *Company ka noker* and claim credit for the duties they have performed.' Appendix C, p. xii, *Committee on the mofussil police*, 1838. J.H. Stocqueler recorded an anecdote about a deputation of prisoners who requested the magistrate to remove their manacles to make it easier for them to cut a forest road, promising on their part, not to escape. The magistrate agreed, the road was cleared, and the convicts returned every night to the jail. J.H. Stocqueler, *India under the British empire*, 1857, reprint, 1992, p. 86. *Sirkar ka naukars*: in the service or employment of Government.

²¹⁸ Report of the third judge, Calcutta, CC, 15 October 1800, BC F/4/98, p. 168. The epithet is still used — a popular song from the film *Jobar and Mehmood in Goa* parodies the journey to jail as a wedding procession to the *sasural*:

*chale baim, chale baim, chale baim sasural,
sasure ka pyar dekbo, bheje baim gabne,
hamen bbi dekbo, hans hans ke pehne,
dekbo ji bima sehra, chamak raba hai chehra,
aaye baim bumko lene, dekbo baraati,
sasure ne lene bheja, lobe ka baathi,
chale baim tan tan ke, sarkari dulha ban ke,*

So we're off to our father-in law's!
See how he dotes on us. He's sent us ornaments (the fetters),
our faces are sparkling.
He's sent us attendants, and an iron elephant.
So we're on our way proudly, we're the sarkar's bridegrooms.

Mouat said he had asked prisoners who complained about conditions whether the jail was a place of recreation. Their spokesman, a Muzaffarpur man, rejoined that

they worked for the Sirkar, and were therefore Government servants, and as such thought their petition was not unreasonable.²¹⁹

Interestingly, both in 1796 and in 1842 when cooked food was being imposed, the prisoners of district Bihar said they would accept a reduced allowance of money or rations instead, a proposal which suggested, unflatteringly, that the state was driven by parsimony in its dealings.²²⁰

In another form of appeal, prisoners portrayed themselves as objects of pity who sought a lighter sentence, better treatment or early release.²²¹ The colonial regime's agenda of humanitarianism conceptualized a uniform and controlled regime of punishment, and one which would undercut any reason for regarding the prisoner or the condemned man as an object of pity. The

²¹⁹ F.J. Mouat, *Reports on jails visited*, p. 139.

²²⁰ In 1796 the magistrate of Bihar district said he had attributed the prisoners' resistance to cooked food to 'a hope of being able to save something out of their present allowance of 3 Pice' but they had preferred a reduced allowance of 2 pice provided they could dispose of it. Magt to Secy, Judl Dept, 18 June 1796, BCrJ 24 June 1796, No. 20, p. 63, WBSA. A half-century later another magistrate of Bihar district was reporting that the prisoners said they would rather have their rations cut by a fourth than accept cooked food. Magt Bihar district to SJ Bihar, 15 July 1842, Bengal Judl Progs, 8 August 1842, No. 41, p. 473, WBSA. In the Banaras disturbances of 1852, one of the rumours was that the Banaras raja had offered to maintain the prisoners for a year if Government would not impose messing in the jail. Magt Banaras to SP, 5 December 1852, NWP Cr Judl Progs, P/233/37, August 1852, No. 147.

²²¹ It is interesting to evaluate this self-portrayal against the penal practises of the Indian states. Indian rulers did not always provide for the subsistence of prisoners, and left the poorer sort to beg from passers by. The identity of the prisoner as offender could therefore blur with that of others who claimed charity. The custom by which Indian rulers performed acts of *khairat*, thanksgiving for the birth of a child or recovery from sickness, included not only the distribution of alms among religious mendicants but also the release of prisoners. Colonial officials characterized such acts as part of the capriciousness and laxity of oriental justice and refused appeals for release on charitable grounds. Some Governor-Generals allowed the release of a few prisoners as a mark of imperial state on occasions of great political celebration; but this was a very limited practise. Cf. Marchioness of Bute (ed.), *The private journal of the Marquess of Hastings*, I, 1858, 2nd edition, pp. 6, 60, 106.

invocation of humanity and of images of benevolent rule by the prisoners themselves, their persistence in picturing themselves as victims of fate, worthy of compassion rather than condemnation, disturbed this conception. Drawing once again upon Dr Mouat, we find him indefatigable in his recommendations regarding 'careful drainage, ventilation, cleanliness and judicious employment'. Yet when prisoners approached him with requests for the removal of their fetters, less labour or more food, he took it as an indication that they 'generally entertain a very erroneous notion of the objects of imprisonment, and evidently consider themselves to be the victims of society.'²²²

It was on the basis of caste and religious identity that prisoners could be most assertive about their rights, both because of government's sensitivity on the issue, and because it gave them a way of withstanding the stigma of punishment by sustaining a sense of connection with society. I will argue, however, that the issue of caste also had a significance for the prisoners as prisoners, in terms of their notions of entitlement *vis-à-vis* the jail administration.

Official consideration for caste could mean a discrimination in the allocation of certain tasks. The dirty and polluting work of cleaning drains and privies and washing clothes was always assigned to the untouchable prisoners. If these were not available the government would even spend money to hire *mehtars* for the 'necessaries and drains'.²²³ This was one facet of the social order which was most faithfully reproduced in the jail regime and which persisted tenaciously.²²⁴ Apart from this task however the general tendency was for the bulk of prisoners to be put on outdoor work repairing roads, digging drains and clearing ground, though the judge or the magistrate could give an exemption on the grounds of 'rank or situation in life'. The issue of caste in the determination of the labour regime really came to the forefront when indoor labour began to be advocated as a significant alternative.

²²² *Reports on jails visited*, p. 61, para 5, pp. 52-3, para 6.

²²³ Cf. for instance Magt Bhagalpur to Sub-Secy Judl Dept, 14 November 1797, BCrf, 24 November 1797, No. 11, p. 267, WBSA.

²²⁴ Such tasks probably expanded as indoor labour increased and prisoners had to use the jail privies to a greater extent. The Committee for Prison Discipline had noted, with disapproval, the practise of making prisoners not sentenced to labour, labour at light work if they were of the 'lower orders'. CPD. 1838, p. 42, para 97.

In 1820 the Nizam Adalat ordered magistrates to assign only 'private labour' to prisoners sentenced for misdemeanours on the grounds that 'in these cases the reformation of the offender is the principal end in view, and not public exposure by way of example . . .'.²²⁵ However, the magistrate of Shahabad opposed this specification, arguing that indoor labour at trades would lead to a loss of caste for those drawn from the landed proprietors and agriculturists.²²⁶ The Judge of Patna agreed, arguing that outdoor work for the higher classes, usually imprisoned for affrays and such misdemeanours, was 'least cruel and odious'.²²⁷ The magistrate's discretion in determining the form of labour was therefore restored on the grounds that 'the distinctions of caste, of religion, and of education seem to render it impossible to fix any fair principle for the adaptation of labor to the offence of which the individual may be convicted . . .'.²²⁸ The episode indicates that whether officials argued in favour of indoor labour or against it, their concern focused on the 'respectable' sections. The magistrate of Shahabad who thought it would not be humane to impose trades and crafts on landed proprietors or agriculturists, thought that castes like the Doms and Gwalas could 'be taught any trade without violence to their religious prejudice'.²²⁹ He also reported that the prisoners who had been building a jail with 'cheerfulness and alacrity', had delivered petitions against private labour 'praying to be spared from the contamination which would ensue'.²³⁰ The restoration of the magistrate's discretion meant that outdoor work remained the main form of penal labour. As long as this labour was in the prisoners' home district this was in fact the form of labour which they preferred, because of looser supervision and opportunities to meet friends and relatives.²³¹ So here a concern

²²⁵ CONA, 18 August 1820. Vagrants were to be sentenced to private labour; in the case of theft, the decision was left to the magistrate.

²²⁶ Actg Magt Shabad to Offg Judge CC, Arrah, 9 October 1821, CPD, appendix, 31. Government wanted to indulge the natives by this measure, he wrote, but 'private labour is . . . too well adapted to shake their confidence in our intentions.' Ibid.

²²⁷ Offg Judge Patna CC to Actg Regr NA, 19 April 1822, *ibid*.

²²⁸ Resoln of Govt in Judl Dept, 27 June 1822, *ibid*.

²²⁹ Magt Shahabad to Offg Judge CC, Arrah Divn, 9 October 1821, *ibid*.

²³⁰ *Ibid*.

²³¹ Cf. CPD, para 107, p. 47 arguing that prisoners disliked working under executive officers away from their districts. They preferred to work under

for the respectable orders meant that convict labour was left in the form which suited all prisoners.²³²

In the 1840s when magistrates in Bihar and the North Western Provinces began to work out a strategy for introducing messing one of their key assumptions was that the caste scruples of high caste Hindu prisoners had more validity than those of low caste or Muslim prisoners.²³³ In their subsequent assessment of the riots officials also tended to conclude that it was the high castes who had been the ring leaders and had succeeded in winning over the lower castes,²³⁴ or, in another explanation, that Muslim prisoners had played on the religious fears of the Hindus.²³⁵ They also argued that the support demonstrated by the people of Patna and Arrah was only for those prisoners who were of the respectable classes and who had been convicted for crimes such as affray which they did not consider very heinous.²³⁶ It is this explanation

the magistrate in the neighbourhood of the district jail because he had less time to superintend them and they could get supplies from their friends.

²³² The Prison Discipline Committee also used the caste argument to buttress its opposition to trades and crafts in jails, but it wanted the magistrate's discretion over the allocation of labour to be replaced by uniform rules.

²³³ In the second attempt to enforce messing in Chapra jail, the magistrate said he had begun with the Muslims because they would be the least likely to object. Offg Magt Saran to Under Secy, Bengal Govt, 17 July 1845, BC 1845-46, F/4/2147, No. 102783. In Gaya jail the magistrate had persuaded the prisoners so far 'that the Brahmuns and high caste Prisoners (whose any scruples on the score of religious prejudices could alone in any degree be reasonable or entitled to consideration)' had eaten their meal, when the lower castes attacked. SJ Gaya to Secy, Judl Dept, 12 September 1845, Judl progs, 17 September 1845, No. 62, BC 1845-46 F/4/2147, No. 102785. In the aftermath of the riot in Patna jail the magistrate took a far more conciliatory line with the high castes who were allowed to form small messes according to their various subdivisions, *jatis*. The other castes were threatened with transfers or confinement till they agreed to eat food made by a high caste cook. Magt Patna to SJ, 4 September 1845, *ibid*.

²³⁴ Magt Shahabad to Under Secy, Bengal Govt, 8 July 1845 and 29 July 1845, BC 1845-46, F/4/2147, No. 102783.

²³⁵ SP, LP, to Secy, Bengal Govt, 20 April 1846, BCrJ P/142/56, 2-9 December 1846.

²³⁶ SP, LP to Secy, Bengal Govt, 16 March 1846, No. 37 and Secy, Bengal Govt to SP, LP, 1 April 1846, *Selections Patna correspondence 1790-1857*, pp. 262-5. Magt Shahabad to SP, 11 April 1846, arguing that opposition to messing had originated in the more respectable classes of prisoners whose crimes being those of affray etc. did not stamp them with moral turpitude. BCrJ P/142/56, 2 December 1846, No. 12.

which Anand Yang also accepts as one of the reasons why rioting prisoners got local support.²³⁷ However, it is difficult to gauge whether this distinction between prisoners existed among all sections of society. The riot in the Deegah penitentiary in Patna had been initiated by the Gwalas, whom the magistrate did not count as of high caste, and yet the incident caused a sensation in the town.²³⁸ Perhaps one has to make some distinction between messing as it affected everyday life for prisoners and the way in which it alarmed certain elites in Bihar and the North Western Provinces about a diminished consideration for rank in other institutional spheres. The orders of 9 July 1841 in Bengal had suggested that prisoners be divided into uniform messes of 20 each, i.e. on the principle of a standard number, and that one cook be appointed for each mess.²³⁹ In the North Western Provinces magistrates were told to proceed with caution. Cooked food and messes

ought not to be compulsorily enforced if there be any good ground to believe they will offend or violate the religious prejudices of the prisoners, or injure the future prospect of those who may be subjected to temporary imprisonment, while on the other hand, should the real ground of opposition be repugnance to relinquish a practice which tends to lighten the irksomeness of confinement in Jail such an objection ought to be at once set aside.²⁴⁰

The distinction, as many magistrates found, was an impossible one to sustain. Some of them postponed the shift, anticipating considerable resistance as well as administrative problems.²⁴¹ Those who did attempt the measure began cautiously, by drawing up lists

²³⁷ 'Disciplining "natives"', p. 38.

²³⁸ J.E.S. Lillie, Magt Patna to Under Secy, Bengal Govt, 23 July 1845, BC F/4/2147, No. 102784.

²³⁹ CONA, 9 July 1841.

²⁴⁰ CONA, No. 855, 20 July 1842, NWP.

²⁴¹ In 1842 the magistrates of Patna, Bihar and Shahabad districts drew back from messing. Resoln, Bengal Govt, 5 June 1843, Home Judl, 21 June 1843, No. 11, NAI. Also, Magt Patna to Regr NA, 4 June 1842, *Selections Patna correspondence*, pp. 244-5. The Bihar magistrate said the prisoners feared they would lose caste and that messing would shake people's confidence about the policy of non-intervention in religion. Magt Bihar to SJ, 15 January 1842, Bengal Judl Progs, 8 August 1842, No. 41, WBSA. Cf. also Commr Kumaon to NA on the difficulty of introducing messes, 1841, COK, Pre-Mutiny, Judl letters issued, vol. 35, Book 6, vol. II, part II, UPSA.

of caste groupings who could eat together.²⁴² The magistrate of Saran wrote out a caste list for Chapra jail, modifying it after petitions and objections from the prisoners.²⁴³ However, to have included all the subdivisions proposed by the prisoners, some of which the magistrate termed 'pretended', would have negated the whole point of messing.²⁴⁴ The men appointed to cook resisted, they were flogged, but 'held out to the last' and were sent to hospital. The other prisoners attacked the jail guard, blaming them for the punishment, and a dense crowd surrounded the jail in support.²⁴⁵ The magistrate and the sessions judge recommended a retreat from the measure.²⁴⁶ The Nizamat Adalat advocated a policy of uniform enforcement, arguing that a concession in Chapra could encourage resistance elsewhere.²⁴⁷ However, the Bengal government disagreed and recommended a cautious and gradual policy, advising magistrates that

a resort to undistinguishing force for the establishment of the messing system is entirely beyond the intentions of government, and on all accounts greatly to be deprecated. . . . They should draw them (the prisoners) on to engage in messes rather than force them, they should consult them as to the number and constitution of the messes, they should listen to all not very unreasonable objections²⁴⁸

²⁴² In Champaran and Tirhut, messing was introduced in 1842 but by modifying the idea of a small number of messes and of eating together in one space. Cf. Magt Chapra to SJ Saran, 12 June 1842, para 18, BCrJ P/142/65, 27 June 1842, No. 15. Cf. also resolu, Bengal Govt, 5 June 1843, Home Judl, 21 June 1843, No. 11, NAI. At Sibsagar, the prisoners were formed in messes according to their caste. Asst Surgeon, Sibsagar to Suptg Surgeon, Dacca, 26 December 1842, MB 20 February 1843, No. 26, NAI.

²⁴³ The magistrate pointed out that with a total of 52 messes for 630 prisoners the rules for messing had been greatly modified by reference to castes and their subdivisions. G.D. Wilkins, Magt Chapra, to G. Gough, SJ Saran, 12 June 1842, BCrJ P/141/65, 27 June 1842, No. 15.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ To accept all the subdivisions Wilkins argued, would set aside any advantages from messing. To force through any thing less would create a ferment requiring violent suppression. Ibid. Cf. also G. Gough, SJ, Saran to J. Hawkins, Regr NA, 14 June 1842, *ibid*.

²⁴⁷ J. Hawkins, Regr, NA to F.J. Halliday, Secy, Bengal Govt, Judl Dept, 27 June 1842, BCrJ, P/141/65, 27 June 1842, No. 14.

²⁴⁸ Wilkins was criticized for insufficient caution and for an injudicious use of force. F.J. Halliday, Secy Bengal Govt, Judl Dept, to Regr NA, 27 June 1842, BCrJ P/141/65, 27 June 1842, No. 16.

These instructions were supposed to guide future action in the Bihar districts but in 1845 messing was pushed through at the cost of considerable violence. Prisoner resistance was hemmed in by summoning troops or crushed out by flogging and firing. Why did all these cautionary warnings collapse and give way to this degree of force?

Rations but much more so the substitution of cooked food deprived the prisoner of a certain range of choices over what he ate, how he distributed his food supplies over the day or week, or exchanged them for comforts such as tobacco. It also increased his work day by taking away the time he had been allowed for cooking.²⁴⁹ In that sense the measure affected all prisoners by giving the jail administration a much wider control over their time and their choices. The concession which the magistrates made was that the prisoners could eat this food in messes organized with some recognition of the caste principle. But the point was that such classifications were immutably stamped by government's effort to heighten the distinction between the sphere of the penal and that of the social. The measure therefore enhanced the censure of a prison sentence. This affected the prisoners in two ways. It made it potentially that much more difficult for them to re-integrate themselves to society once it was known that this aspect of their daily regime had been brought under a different order of priorities.²⁵⁰ In addition, the intervention of government in the business of deciding who could eat with whom may have threatened caste ranking and social status, always contestatory, with a dangerous rigidity. This would affect prisoners across the social scale, including the Muslims and the lower castes, especially as the magistrates seemed to be separating off the higher castes for special consideration.²⁵¹ But

²⁴⁹ Officials recommended messing because it would put an end to bartering for 'indulgences' and increase the work day. Cf. letter to G. Swinton, Chief Secy, Bengal Govt on messing in Assam jails, Foreign Dept, A, 1831, 10 June 1831, No. 60, NAI.

²⁵⁰ In 1796 when the introduction of cooked food had been attempted, the magistrate of Bihar district reported that the Hindus confined for a limited period said that 'tho' their cast will not in fact, be affected by eating from the hands of a Bramin, yet their relations will reproach them with it after their release, and make it a pretext for refusing to eat or intermarry with them.' Magt Bihar to Regr NA (nd), in letter to Sub-Secy, 18 June 1796, BCrJ 24 June 1796, No. 21, pp. 70-1, WBSA.

²⁵¹ For a more contemporary period for instance, P.C. Roy Chowdhury noted the competition between Gwalas and Kurmis over caste ranking,

clearly messing was also resisted as a loss of dignity *vis-à-vis* the jail administration. For instance, in 1796 the magistrate of Bihar district said that though the fear of ostracization by relatives could not apply to Muslim prisoners or to those confined for life, these had been equally 'pertinacious' about cooked food.²⁵² His implication was that prisoners sentenced for life were in a sense dead to society; issues of caste should not matter to them.²⁵³ But this 'pertinacity' indicates that all prisoners had a sense of certain rights *vis-à-vis* the jail administration, whatever the length of their sentence.

If caution had marked the introduction of messing in the 1840s, it was imposed with considerable harshness after the riots. Government tried to explain that troops had been called in not to impose messing at the point of a gun, but to ensure that riots did not take place. But this was a specious distinction.²⁵⁴ In all the prisons men had been flogged before they would agree to cook or threatened with transfer to other distant jails before they submitted to messing.²⁵⁵

In understanding the anxiety of the elites of Northern India about the introduction of messing, it should be noted that they did not disapprove of harsh penalties for offenders. Officials often

observing that each regarded itself as a little higher. They would accept cooked food from each other but would not eat sitting in the same *panti*, line. *Inside Bihar*, 1962, p. 78.

²⁵² Magt Bihar to Regr NA (nd) in letter to Sub-Secy, 18 June 1796, BCrJ 24 June 1796, No. 21, pp. 70-1, WBSA.

²⁵³ 'Even considerations of caste become less important in the case of a prisoner for life . . . ' CPD, p. 64, para 145.

²⁵⁴ The Patna magistrate asked for a detachment of sepoys to be present at meal time in the Deegah penitentiary: 'I do not mean that the prisoners should be compelled to eat at point of the bayonet, but that the sepoys should be sent as a precaution to overawe them.' Bharose Bhaggut, a prisoner, gave a different impression in his petition: the magistrate and his assistant 'with a large assembly, armed with war-like weapons came to the Deegah jail and forcibly made the prisoners eat . . . ' Magt Patna to Under Secy Bengal Govt, 23 July 1845; petition of Bharose Bhaggut, 16 August 1845, BC 1845-46, F/4/2147, No. 102784.

²⁵⁵ An index of the tougher line taken in this round is the comment of the Sessions Judge of Bihar district in the aftermath of a firing that left 16 prisoners dead and 20 wounded. Messing was completed, he stated, without more resistance 'than was naturally to be expected in carrying out a new system of dieting so strongly obnoxious to the prejudices, however unreasonable, of almost all classes affected by it.' SJ Bihar to Secy, Bengal Govt, 19 October 1845, No. 173, BC 1845-46, F/4/2147, No. 102785.

reported that the respectable sections of society felt that imprisonment was not a deterrent penalty for the lower classes. Native officers in the army were said to favour corporal punishment for their subordinates.²⁵⁶ Officers of the Madras Presidency cited the opinion of 'an experienced and intelligent native officer, Tambusawmy Moodily' in favour of capital punishment for gang robbery.²⁵⁷ In 1796 when the introduction of cooked food was attempted in jails there were no reports of wider support for prisoner resistance.²⁵⁸ One difference in the 1840s was that messing was imposed in a period in which the landed and service elites had begun to fear that government was citing 'rule of law' to decrease its reliance upon an order which had given them considerable room for negotiation. This could affect the purbia sipahi, his sense of alliance with the victorious Company being eroded by the tightening of martial law and a declining commitment to a high caste army. The old service families who provided the *amla*, subordinate Indian bureaucracy, feared that government schools, and the abolition of Persian as the language of the courts would threaten their position.²⁵⁹ In the famous Patna conspiracy case of 1846 rumours circulated that a judicial order would be passed forcing Muslim women out of pardah, prohibiting circumcision, forcing the messing system on the court *amla* and treating the zamindars with similar disrespect.²⁶⁰ Alarmed by such rumours government made one conciliatory gesture — it withdrew messing for prisoners under examination and for those sentenced to simple

²⁵⁶ Cf. Major Rowcroft to SP, LP, 15 April 1846, remarking that native officers spoke of the laxity of jail discipline for military prisoners. BCrJ P/142/56, 2 December 1846, No. 12. In 1847 the Judge Advocate General said native officers of the Bengal and Bombay armies approved of the re-introduction of corporal punishment. General letters to the Court, Military, January-June 1847, pp. 75-82, NAI.

²⁵⁷ Second report on the Indian Penal Code, 1846, p. 211, para 458, PP, 1847-48, vol. 28.

²⁵⁸ Cf. BCrJ, 17 June 1796-12 August 1796, WBSA. However, in 1796 cooked food had been imposed only on prisoners sentenced to seven years with labour and above. In the 1840s messing was initially imposed for all prisoners but subsequently withdrawn for those sentenced to simple imprisonment without labour.

²⁵⁹ Act XXIV of 1837. Cf. also epilogue.

²⁶⁰ Confession of Pir Baksh, in Magt Patna to Secy, Bengal Govt, 3 January 1846, BC F/4/2147, 1845-46. Statement of Surbanand Chaudhury, 1st regt, 24 December 1845, *ibid*.

imprisonment without labour. The presumption was that the latter would include the bulk of those confined for offences arising out of land disputes, on whom the sympathy of Chapra and Patna towns was supposed to focus.²⁶¹

The government's attempts to change the symbolic structure of public authority took shape in a situation in which it had not significantly expanded its institutional and technological capacities. The difficulty with the treadmill is a farcical instance of the gap between aspiration and reality. The frontier wars and the rapid expansion of territory stretched administrative resources even further. The harshness with which messing was enforced where it had been attempted suggests a certain nervousness about revealing vulnerability.

Surveying the changes in penal policy of this period what is noticeable is a shift along two interlinked trajectories. The first was an effort to make the criminal justice system more acceptable to the 'respectable orders' by curtailing punishments of public infamy. The second trajectory was that of the more general criteria of humanity or human dignity in the forms of punishment. The issue of humanity, as I pointed out, wove into aspirations for a more transcendent order of political and legal sovereignty. But advocates of humanity also had to buttress their arguments by referring to the particular advantages of conciliating the respectable. The impulse towards a wider arc of legitimacy for rule of law was a weak one, easily retracted in moments of crisis. This is evident in the restoration in 1844 of the Magistrate's powers to inflict corporal punishment because of the pressure on jails, and the re-introduction of military flogging under the strain of the frontier wars. In the case of messing the government made some conciliatory overtures to reassure the 'respectable classes'. But its refusal to abandon the measure seemed to presage a loss of power for the Indian elites in other institutional arenas. For prisoners the simulation of continuity, the disavowal of censure, had found easier expression under a 'lax' jail regime.

²⁶¹ J.F. Halliday, Secy, Bengal Govt, to SP, LP, 1 April 1846: 'it is very probable that the class of persons sentenced to simple imprisonment will include most if not all of those for whose privations the people in general are thought by you to have special sympathy.' *Selections Patna correspondence*, pp. 262-4. Cf. also Govt of Bengal to COD, 7 November 1846, No. 24, General letters to COD, 7 January-11 December 1846, vol. 27, WBSA.

Epilogue

Criminal Law and the Colonial Public

In the 1830s, having shaken off the odium of monopoly interest, the Company was in a stronger position to distance itself from its own mercantilist past and vest itself with the delegated authority of Parliament. With this shield against attack from free-trading lobbies it could claim to protect the interests of all residents within India.¹ Fiscal reform, the issue of cost-cutting which dominated Bentinck's governor-generalship, also reinforced the legislative authority of the Government of India.² Retrenchment required greater co-ordination between Presidencies, and sufficient clout to encroach on the interests of the Company's own officials. However, a closer association with Parliament also forced the Government of India to vindicate its reform credentials before British public opinion, a factor which allowed Company officials to canvass their schemes for 'improvement', and use the European press in India to do so, without jeopardizing their careers.³

Paralleling these developments was an abandonment of the

¹ In defending Act XI of 1836 which put European residents on a uniform footing with Indians in civil jurisdiction, Macaulay said the Company no longer legislated as competitor of the private merchant, but as a ruling body to protect all its subjects. Minute by T.B. Macaulay, PP, 1837-38, vol. 41, p. 239.

² Cf. E. Stokes, 'Bureaucracy and ideology', *Transactions of the Royal Historical Society*, fifth series, vol. 30, 1980, pp. 131-56.

³ In 1837, F.J. Shore was able to claim authorship for critical writing which he had published anonymously earlier. He acclaimed the growth of 'public feeling' in British Indian government and addressed his book to 'the rising generation of functionaries' who would carry on with the work of 'improvement'. *Notes*, 1, 1837, pp. 1-2, 181. J.W. Kaye wrote of the hostility of the 'old oligarchy' of Calcutta to officers who used the press to criticise Government, but pointed out that the press also allowed Government to monitor its functionaries without using spies. J.W. Kaye, *The life and correspondence of Charles Lord Metcalfe*, vol. II, new and revised edition, 1858, pp. 138-40, 155.

remaining marks by which the Company had acknowledged Mughal sovereignty, and an elaboration of its own political agenda as paramount power. One of the most significant gestures of assertion was the removal of the name of the Mughal emperor from the Company's rupee coin in 1835 and the substitution of the legend 'William the IV, King of England' instead.⁴ The Company's government now strove to constitute itself as the sole font of honour for Indian rulers and chiefs,⁵ and assumed an imperial style in the building of public works, in conscious competition with the Mughal legacy. The connection between Mughal legitimacy and the deployment of Islamic law in the faujdari adalats, which had once strengthened the Company's uncertain claim to the Bengal Nizamat, was scarcely referred to now. Instead, Islamic law and the Islamic law officers were represented more starkly as elements of a particularistic religious tradition imposed by foreign conquerors.⁶ Coupled with this were efforts to find a universalistic idiom of jurisprudence for the criminal law in India, either in the form of digests and compilations, or in the penal code as drafted in 1837.⁷ Persian, once the language of the literate elite and of communication between rulers, was now termed a foreign language by officials who advocated its replacement by the vernaculars.⁸

To implement and support its new priorities, the Company had to develop resources of agency and social constituency. Central to

⁴ Cf. J.S. Deyell and R.E. Frykenburg, 'Sovereignty and the "sikka" under Company Raj', *IESHR*, xix (January-March 1982), pp. 1-26. Interestingly, in the popular estimation of the magical properties of certain coins, the Shah Alam coin was still considered the potent one for thief detection ordeals. *North Indian notes and queries*, vol. iv, 1894-95, No. 274, p. 125.

⁵ In the 1830s it appropriated the Mughal emperor's right to grant titles and to confer khilats on rulers and chiefs, but often found it difficult to get Indian rulers to accept the validity of this change. Cf. Urmila Walia, *Changing British attitudes towards the Indian states, 1823-35*, 1985, pp. 22-7. The Indian princes also continued to coin money with Mughal inscriptions after the Company had removed them from their coinage. 'Sovereignty and the "sikka"'. *Khilat*: robe of honour, given by a superior to the inferior.

⁶ For instance, Law Commissioners to GG in C, 14 October 1837, *PP*, 1837-38, vol. 41, p. 486.

⁷ *Ibid.*

⁸ For instance, F.J. Shore, 'On the Injustice of compelling the People of India to adopt a Foreign Language and Character', chapter heading in *Notes*, vol. II, 1837.

these imperatives was the fashioning of a mode of address for potentially particularist social groups in such a way as to uphold the universalist rhetoric of rule of law. One of the most obvious 'particularisms' on the terrain of law was that of race, crystallized in the separate jurisdiction of the Supreme Courts of the Presidency towns over British residents in India. The contradiction between race privilege and the universalistic premises of rule of law is sometimes stated as a constant in the ideology of colonial rule. It might be more useful to approach race prerogative as an issue which had to be continually reevaluated to find the appropriate legal form for its expression. Transformations in the public terms of class and gender in the metropolis could synergise with changes in the terms of race distinction in the colony as well.⁹ For instance, anxieties about plebeian unruliness in Britain entered into assessments about the opening out of India to free trade, making it important for the Company's government to feel in control of the terms of race distinction. British residents in India had to be made amenable to the Company's courts of law to ensure that race arrogance did not assume politically dangerous levels, but also to monitor white men and women of the 'lower ranks' who might behave in ways inappropriate to race prestige. The idea that some of the shiftless sort from Britain might jeopardize the dignity of race could conjure paranoid scenarios for colonial rule. Asking for powers to send prostitutes to the House of Correction, as under the English vagrancy laws, the Chief Magistrate of Calcutta warned darkly of the prospect of 'European women roaming thro' the streets at night in their shifts . . . of the poor half caste female, resigning the customs of her proper race and walking the streets in the day in the dress which usage sanctions in regard to the poor native.'¹⁰

Despite the distinction of race, the theme of rank and respectability continued to form an important bridge between various configurations of European and Indian public opinion. At certain

⁹ Cf. F. Cooper and Ann L. Stoler, 'Tensions of empire', for a discussion of 'the ways in which class visions were transformed into racial distinctions on colonial ground . . .'. *American ethnologist*, 16, 4 (November 1989), pp. 609-21. Also, D.O. Williams, 'Racial ideas in early Victorian England', *Ethnic and racial studies*, 5 (1982), pp. 196-211.

¹⁰ D. McFarlan, Chief Magt Calcutta, to Secy Bengal Govt, Judl Dept, 31 August 1838, Leg Progs, 26 November 1838, Nos 6-10, NAI.

conjunctures even a common terrain of discussion could emerge, as around the issue of free trade.¹¹ Changes in the communicative mechanisms of public authority stimulated Indian elites to explore the potential of the printing press and the postal service to re-frame older communities of public debate in both 'traditionalizing' and 'modernizing' directions.¹² One such current of modernity can be traced to the Indian intelligentsia seeking to recast men in a more liberal individualistic mould, exploring the ideological potential of the law to change familial relations but also to claim civic equality for Indians of respectability.

In the reverse direction to this pressure for legislative intervention in Indian society, was a tendency on the part of the colonial state to curtail its executive presence in religious institutions. From 1838 the Company began to disengage from a direct role in the management of temples, religious endowments, and the collection of pilgrim taxes. Here again the historical trappings of kingly prerogative and patronage were being jettisoned in the name of religious neutrality.¹³ Yet colonial policy aimed not so much to snap the official connection with these important institutions, as to alter the parlance of the relationship, to place government in a position from which it could arbitrate over rights and resources related to religious affairs from the 'neutral' position of the courts.¹⁴ Was this retreat to the legislative sphere a response to the sharpening of sectarian tensions? Or, as some historians argue, was it the very separation of political authority

¹¹ Cf. Blair Kling, 'Economic foundations of the Bengal Renaissance', in R. Van. M. Baumer, *Aspects of Bengali history and society*, 1976.

¹² C.A. Bayly argues that the challenge of missionaries and 'crypto-Christian administrators' energized and re-structured existing epistemological communities with traditions of debate, publicity and diffusion of knowledge, built by the rationalistic and reformist traditions of seventeenth and eighteenth-century North India. 'Returning the British to South Asian history', *South Asia*, xvii, 2 (1994), pp. 1-25 and 'Colonial rule and the "informational order" in South Asia', in Nigel Crook (ed.), *The transmission of knowledge in South Asia*, 1996, pp. 280-315.

¹³ D.P. Sinha, *Some aspects of British social and administrative policy*, 1969. E.D. Potts, *British Baptist missionaries in India 1793-1837*, 1967, pp. 139-68.

¹⁴ Act X of 1840 for instance, abolished taxes or fees upon pilgrims going to Allahabad, Gaya and Jagannath and transferred the charge of the Jagannath temple 'exclusive to a competent Hindoo superintendent, under a full responsibility to the established courts of justice, for the redress of any violence or wrong, upon the application of any party interested.' (Emphasis added).

from arenas of social authority that had sharpened sectarian strife in the first place?¹⁵ I conclude with some conjectures on the attempt of colonial law makers to orient themselves to these bodies of Indian and European public opinion in changing the terms of legality. These calculations made the track of 'true neutrality' a very convoluted one.

Race and the Rule of Law

The disruption anticipated from the unrestricted opening out of the interior to European enterprise brought the issue of racially structured legal jurisdiction to the forefront of official discussion. It was not so much that a great wave of European settlement was expected, as that another flurry of freebooting, with dangerous political consequences, was feared.¹⁶ The troubled history of the indigo planters in the countryside, and their various battles in the civil and criminal courts, had given a foretaste of what might be expected. The extension of judicial and legislative authority over British residents also seemed to be necessary to preclude tensions arising from missionary zeal, or the insensitivity of Europeans in matters of caste, religion, and other social norms.¹⁷

¹⁵ Arjun Appadurai argues that the Company had to retreat from executive intervention in temple affairs because the form in which it inserted its authority ultimately created a pressure for withdrawal. Building on the indigenous idea that rulers had to 'protect' temples, they introduced another notion, that of the legal definition of temples as public trusts and charities. This brought these institutions under the jurisdiction of the courts, and Indians began to turn to the law to challenge the government's measures in temple affairs. Appadurai traces the legal reification of diverse rights and the evolution of sharper sectarian identities to this interaction between temple and judicial process. A. Appadurai, *Worship and conflict under Colonial rule*, 1981, pp. 17-18, 137. Cf. Sunil Chander, 'From a pre-colonial order to a princely state', Ph.D., Cambridge, 1987, pp. 140-51, for an argument that the centralization of coercive state power and the pressure of the military-fiscal demands exerted by the Company began to change the nature of political community.

¹⁶ 'As we are satisfied that nothing could add more strength to the Government, or can be more beneficial to the people, than the free admission of honest, industrious and intelligent Englishmen, so we are satisfied that no greater calamity could befall either the Government or the people than the influx of Englishmen of lawless habits and blasted character.' Draft Penal Code, Note A, PP, 1837-38, vol. 41, p. 535.

¹⁷ Cf. Legislative letter from India, 31 August 1835, No. 3, BC F/4/1555,

One battle to allow the Company's courts to regulate race distinction was won in the sphere of civil jurisdiction with the passing of Act XI of 1836.¹⁸ This act removed the privilege given to a British defendant to appeal to the Supreme Court at the Presidency town in a civil case in which an Indian could only appeal to the Sadar Diwani Adalat. Government backed Macaulay despite a stormy campaign against the 'Black Act' from the British residents at Calcutta. Public authority could not be openly hostage to a public opinion which was too narrowly European.¹⁹

However, criminal jurisdiction raised questions of social ignominy and disgrace, so race distinction proved a more intractable problem on this terrain.²⁰ Many officials were wholeheartedly in favour of bringing British residents under the jurisdiction of the Company's criminal courts.²¹ Yet while the substantive law could be made uniform, special arrangements for trial and punishment were necessary to preserve the prestige of race. Macaulay had no reservations about a common penal code for Indians and British subjects,²² but he drew a line at the obliteration of all distinctions in the matter of punishment.²³ Europeans convicted of serious

1836-37, No. 63507; also DPC cl 284 providing punitive measures against this contingency. Missionaries criticized this clause as too restrictive of proselytization.

¹⁸ Minutes of the Supreme Government of India on the subject of Act XI of 1836. PP, 1837-38, vol. 41, pp. 219-43.

¹⁹ '[P]ublic opinion means the opinion of 500 persons . . . love of liberty means the strong objection . . . to every measure which can prevent them from acting as they choose towards the 50 million', wrote Macaulay, excoriating the agitationists. Ibid., p. 221.

²⁰ Magisterial office opened to Indians more slowly than opportunity in the civil judiciary and the revenue service. It was only in 1843 that the position of deputy magistrate was opened to Indians, and they were constantly charged with want of 'fitness and energy'.

²¹ The 1838 Bengal police Committee was strongly in favour of placing all British subjects under the jurisdiction of the local criminal courts, *Committee on the mofussil police*, 1838, pp. 23-4, paras 62-5. C.F. Trevelyan, 'The thugs or secret murderers of India', pp. 357-95; G. Campbell, *Modern India*, 1852, p. 466.

²² Minute, 4 June 1835, Home, Judl Criminal, 15 June 1835, No. 1.

²³ DPC, cl 43-4, PP, 1837-38, p. 477. In his draft penal code of 1837 he provided that if a prisoner was not 'both of Asiatic birth and of Asiatic blood', the government could commute a part of the sentence of imprisonment to a term of transportation, with the proviso that the convict might be banished from India thereafter. Nor could the system of prison discipline be the same

crime, Macaulay argued, should not be allowed to remain in the country:

It is natural and inevitable that in the minds of a people accustomed to be governed by Englishmen, the idea of an Englishman should be associated with the idea of government. Every Englishman participates in the power of Government tho' he holds no office. His vices reflect disgrace on the Government tho' the Government give him no countenance.²⁴

Race and the Command of Public Space

The Company's courts in India were conspicuously lacking in any of the forms which dignified the proceedings of English courts. Nevertheless, race shaped the way in which judicial and magisterial authority were communicated. The British magistrate or judge occupied his office as white ruler. In 1826 British civil servants were warned they must not adopt an Indian style of dress, 'for obvious reasons'.²⁵ The controversy about whether Indians were to be allowed to wear their shoes in court was a persistent one.²⁶ Some British officials insisted that Indian *vakils* and subordinate employees show deference in the native way, by taking off their slippers when appearing before them in court.²⁷ The adoption of European etiquette by Indians was viewed as a presumptuous claim to equality. Civil servants examined in England on court procedure were asked with surprise whether they did not allow

for Europeans as for Indians. It would be cruel, keeping in mind their physical inability to withstand the same regime, and 'if not cruel it would be impolitic.' Ibid., Note A, p. 536.

²⁴ DPC, Note A, p. 535. This distinction in punishment was described by V. Srinivasiah, a sheristadar of Chingleput court, as 'something like the indulgent consideration recommended by the Hindoo law in favour of Brahmin offenders which is . . . ridiculed by the European nations.' Note on draft code, 26 November 1838, Leg Progs, 2 December 1842, No. 54, p. 577, NAI.

²⁵ Resoln of Govt, 12 January 1826, Mirzapur Collectorate, Pre-Mutiny, letters received from the superior courts, January 1826-December 1829, Basta 10, Series VII, vol. 66, RAA.

²⁶ Cf. CO, SDA, 2 September 1802, stating it was not derogatory to a court of justice for natives to wear slippers in it. Mirzapur Collectorate, Pre-Mutiny, Basta 7, Series V, vol. 44, 1798-1802, RAA. F.J. Shore, *Notes*, vol. II, pp. 505-6, for an argument in favour of obliging Indians to take off their shoes in court.

²⁷ *Vakils*: representatives, later, pleaders and lawyers.

Indian officials of the court a chair to sit on during proceedings. The answer usually was that the most respectable might be permitted to sit down.²⁸ It clearly rested with the magnanimity and good temper of the magistrate or judge.

In the 1830s the evangelical crusade against official participation in 'idolatrous ceremonies' and the administration of Hindu and Muslim religious establishments could also find support in race sensibilities. European officers found it humiliating to accept these ceremonies and observances as a constituent of 'the public realm'.²⁹ In 1838 Auckland had to deprecate that 'exaltation of ideas' on the religious issue which he said was far too prevalent among the officers of the Indian army.³⁰ The argument of 'true neutrality' could therefore be used as much by the proponents of a clearly white and Christian visage for government as by those who commended its Utilitarian virtues.

²⁸ Examined on this point before the Select Committee in 1832, W.L. Melville said the observance originated with the 'Mahomedan government', so some European judges had been very 'tenacious' about not allowing a chair, but were less so now. Minutes of evidence before the Select Committee, 12 April 1832, *PP*, 1831-32, vol. 12, p. 713. Rammohun Roy reported that in the lower courts the judges treated the Indian pleaders 'as an inferior caste'. 'Questions and Answers on the Judicial System of India', *The English works of Raja Rammohun Roy*, part III, Calcutta, 1947, p. 15. J. Paton, Assistant to the resident at Lucknow, remarked that in many Company courts 'respectable natives are not allowed a chair to sit down in but made to stand like menials.' J. Paton, BM, Addnl Ms 41300.

²⁹ Cf. 'Memorial of the European Population of Madras to the Governor', 6 August 1836, pressing for the 'true principles of religious toleration'. *PP*, 1837, vol. 43, pp. 186-9. Bevan, a long serving officer, noted that British officers now refused to participate in, or give subscriptions for the ceremonies of their Indian troops, though such practices maintained a 'kindly feeling'. He recalled a time when the Company's flags and galloper guns used to be lent for Muharram processions, and the officers arms had been piled with those of their sepoys around the 'altar' of the idol at the Dasehra festival. Major H. Bevan, *Thirty years in India*, vol. 1, 1839, pp. 92-9.

³⁰ He was referring to the resignation of Maitland, the Commander in Chief at Madras, over the presence of Company troops at religious celebrations. Auckland to Hobhouse, 20 February 1838, Broughton Papers, Mss Eur F 213/9, p. 148. Cf. *On British interference with the religious observances of the natives of India*, by 'Moderator', London, 1838, pp. 25, 35, warning that the withdrawal of official 'countenance' from public ceremonies of Hindu worship would weaken the attachment of the sipahis and would encourage European arrogance towards the religious prejudices of Indians.

The policing of municipal life in the Presidency towns offers another instance of the racial cast of magisterial authority, in the marking out of spaces where European residents were shielded from certain sorts of 'public nuisances'. This included beggars making 'disgusting exhibitions' of themselves, ascetics who were 'indecently' naked, or the 'barbarous spectacle' of hookswinging.³¹ However, from the 1840s and 1850s there was also some effort to draw 'respectable' Indians into the regulation of municipal life through committees of improvement. The down to earth consideration here was that improvement would require local taxes and therefore some social acquiescence.³² Respectable Indians did not always accept the opinion of the British magistrate, or of European residents, about the criterion of public spirit or about what constituted a public nuisance. Nevertheless, Act XXII of 1840 to punish vagrants in the Presidency towns for 'extorting alms by offensive and disgusting Exhibitions and Practices', illustrates greater official confidence about institutionalizing a different definition of the 'true' objects of charity.³³ European public opinion in India had long urged government to restrict and regulate the social space claimed by religious mendicants. Though the Act itself was carefully phrased against 'annoyance' rather than against all mendicancy, it seemed to envisage a municipal environment which would guide respectable Indians to discriminate

³¹ In the jurisdiction of the Supreme court the Calcutta magistrates had prohibited such 'nuisances' using their discretionary powers. Macaulay's draft code cited the ban on of hook-swinging before European houses at Chowringhee in Calcutta to illustrate the clause punishing disobedience to a local order if it caused 'any obstruction or annoyance.' *DPC*, cl 182, and Note F. Cf. also Act XXII of 1840, to punish 'extortion' and 'annoyance' by beggars in the Presidency towns, and Act XXI of 1841, empowering magistrates to punish local nuisances.

³² A circular of 1848 outlined committees to supervise the outlay of surplus ferry funds on public roads, bridges and serais. The magistrate and district executive officers were ex-officio members, but they were also supposed to include nominees from 'persons out of service, natives and Europeans'. CO, from SP, LP, No. 2 of 1848, in F.L. Beaufort, *A digest*, second edition, part II, 1859, p. 593. Act XXVI of 1850 provided for municipal commissions in towns, constituted by the magistrate and inhabitants whom he nominated. Ittulus Prichard gives a hilarious account of the setting up of one such commission in *The chronicles of Budgepore*, reprint, 1972.

³³ Sleeman had suggested a clause along these lines in the draft penal code. Second report on the Indian Penal Code, 1846, p. 90, para 518.

between the really needy and 'hale and hearty fakirs' or 'greedy Brahmins'.³⁴

Rationalized Governance or an Enlightened Public

Questions of institutional form and bureaucratic agency were crucial to the discussion about a judicial culture which would foster a different imagination of state power and the social field of its authority. There were two principal conceptions about developing a public life which would gird the colonial regime. The first was an authoritarian reform initiative, of the kind I have described for Bentinck's tenure, where Indian agency would be refashioned to greater conformity with universalist codes, but might also provide the nucleus of an enlightened public. Secondly, certain consultative procedures were also envisaged for the cultivation and involvement of a non-official public in the process of the law. As I will suggest, neither move quite came off, and a rather different sort of institutional and public frame, more pragmatic than with a strong ideological investment in the law, tended to emerge around the courts.

Instituting Rational Governance: From Maulvis to 'Juries'

In appointing maulvis as law officers in its criminal courts, and instituting their fatwa as an essential part of the procedure of criminal trial, the Company had been able to draw upon the administrative experience of an established service gentry, and upon the traditions of rule associated with Mughal legitimacy. The determining influence of the fatwa on the sentence was curtailed

³⁴ Bentinck cited a shift in attitudes towards charity in Calcutta as one of the positive signs of social change. 'Much of what used, in old times, to be distributed among Beggars and Brahmins, is now . . . devoted to the ostentatious entertainment of Europeans, and generally the amount expended in useless alms is stated to have been generally curtailed.' Minute on European settlement, 30 May 1829, *CLWCB*, I, p. 205. Cf. D. McFarlan, Chief Magt Calcutta, to Secy Bengal Govt., Judl Dept, 31 August 1838, about finding shelters for lepers so that measures could then be taken against the 'healthy stout beggar' who diverted funds from their legitimate object. Leg Progs, 26 November 1838, Nos 6-10, NAI. Auckland said that police abuse of a vagrant act would have to be risked because the evil and inconvenience of 'improper mendicancy' was so great in India. Minute on draft of Vagrant Act, 21 June 1840, BM Addnl Ms 37,712, pp. 300-1.

in the early nineteenth century,³⁵ but the fatwa was still taken, and the law officer attended at every trial.³⁶ Even when the fatwa could be overruled, the Islamic law officers still played an important though informal role in assisting the British judge towards an understanding of the depositions and the general issues being presented. Rammohun Roy commented that 'they [the Islamic law assessors] are all of the most essential utility, and indeed the main instrument for expediting the business of the criminal courts.'³⁷

In 1832, however, the presence of the Islamic law officer and his fatwa were disestablished as part of the trial procedure. An alternative was offered in the form of a trial in which the judge would be assisted by a panel of assessors or a 'jury'.³⁸ By an earlier regulation of 1810 the Governor General in Council could permit a court of circuit to dispense with the Islamic law officers and their fatwa for a particular trial.³⁹ This provision was introduced against a backdrop of tension around the trials conducted in the aftermath of the 1809 communal riots in Banaras.⁴⁰ But it was formulated as an exception intended for special cases.⁴¹ So it was Regulation 6

³⁵ Reg 1, 1810; Reg 17, 1817.

³⁶ The Islamic law officers had to be present during the trial whereas the presence of the Hindu pandits, appointed to give vyvasthanas on civil law, was not required in court. Cf. Minute by GG Auckland, 30 October 1839, BM Auckland, Addnl MS 37,712, Minute Book vol. IV. The British judges of the Nizamat Adalat held that the fatwa was an essential component of the criminal trial. Cf. for instance, Bengal government to COD on sati trials, 4 December 1829, *CLWCB*, I, p. 363.

³⁷ Raja Rammohun Roy. 'Questions and Answers on the Judicial System of India', communication to the Select Committee, 1831, *English works*, part III, p. 30.

³⁸ Reg 6, 1832, see below.

³⁹ In such cases the court of circuit had to submit its proceedings to the Nizamat Adalat for the final sentence, Regulation 1, 1810.

⁴⁰ The magistrate and the judges of the Banaras court of circuit reported that the trial of Hindus in this context, by a procedure which required a fatwa from an Islamic law officer, was generating great tension. The Nizamat Adalat opposed any change, arguing that an offence ought to be tried by the laws in force when it was committed. But Government insisted on an enactment to dispense with the fatwa when necessary. Actg Magt Banaras to Secy Judl Dept, 30 October 1809, No. 23; Magt Banaras to Secy Judl Dept, 21 November 1809; Banaras CC to Regr NA, 29 December 1809, No. 33; BC F/4/365, 1812-13.

⁴¹ And, as Jorg Fisch points out, this provision did not extend to the Nizamat Adalat which still had to consult its Islamic law officers. *Cheap lives*, p. 108.

of 1832 which made a more fundamental change in allowing the sessions judge to use assessors in place of the Islamic law officers.⁴² In 1835, following another communal riot in Banaras, the Agra government recommended that in cases involving the religious prejudices of Muslims the judge should dispense with the Islamic law officer and use a jury instead.⁴³ In other words the law officer's presence was now held to compromise the neutrality of such trials.

The office of the *korani mullah*, the man who administered the oath on the Koran to Muslim witnesses in court, was abolished in 1840 when the religious oath was replaced by a form of affirmation.⁴⁴ Yet Islamic law still provided the formal source of authority for the punishment of sundry offences, as for instance, gambling, which had not been defined in the regulations.⁴⁵ And if such an offence had been tried with assessors or a jury instead of with the Islamic law officers, the judge had to refer to the Nizamat Adalat for sentence.⁴⁶ The object of this reference was clearly stated in a circular order declaring 'the incompetency of the sessions court, unassisted by a Islamic law officer, to declare that to be a crime which is not so declared by the Regulations. The law professedly administered is the Islamic law amended and modified by the Regulations.'⁴⁷

⁴² The regulation also provided that persons of other religious persuasions could claim an exemption from trial conducted with the assistance of the Islamic law officer, and the judge could use assessors or a jury instead. It stated that this would enable European judges to obtain the assistance of respectable natives, but that an alternative had also become necessary because trial with an Islamic law officer was 'offensive to the feelings of many persons who are subject to the Government of this Presidency and do not subscribe to the Mahomedan criminal code'. Reg 6, s 1, 1832.

⁴³ Secy, Agra Govt, to Offg Regr NA, 18 September 1835, Azamgarh, PMJ, Basta 29, vol. 68, Commr's Office Gorakhpur, RAA.

⁴⁴ The office of the *gangajalli*, the Brahmin who administered the oath on Ganges water, was also abolished.

⁴⁵ If the judge held that an offence had been committed but there was no specific regulation under which it could be punished, he was to take a *fatwa* from the Islamic law officer and proceed in conformity with his exposition of the Islamic law. Construction No. 891, 18 July 1834, in H.C. Tucker, *My notebook*, p. 284; F.L. Beaufort, *A digest of the criminal law*, p. 232. The law officer usually declared that the offence merited some order of discretionary punishment, *tazir* or *akoobut*, which allowed the magistrate or judge to formulate a sentence.

⁴⁶ Reg 6, s 4, 1832.

⁴⁷ CONA to SJs and Commrs of Circuit, No. 55, LP 19 June 1840, WP. 24 July 1840, in *Circular orders*, vol. 3, p. 243.

From Religious Oath to Affirmation

In 1840, when the religious oath was replaced by an affirmation which simply invoked 'the presence of Almighty God',⁴⁸ the legal identity of the subject was being recast in more universalistic terms. This decision could also be notched up as a victory in the campaign to break the official connection with Hinduism and Islam.⁴⁹ Another such measure was the order of 1841 stating that judicial proceedings were not to be headed by the names of the 'heathen deities'.⁵⁰ Indian employees were asked to leave the invocation of their gods out of official business.⁵¹ In 1834 Charles Metcalf, as Vice President in Council, also sought to reduce the number of Hindu holidays to facilitate public business.⁵²

The Draft Penal Code: Drawing a Line through History?

The draft penal code of 1837 was the most ambitious project for a legal authority which would require no point of reference other than 'universal' principles of jurisprudence.⁵³ It was only

⁴⁸ 'Whereas obstruction to justice and other inconveniences have arisen in consequence of persons of the Hindoo or Mahomedan persuasion being compelled to swear by the water of the Ganges, or upon the Koran, or according to other forms which are repugnant to their consciousness or feelings . . . ' Preamble, Act v, 1840. Cf. Radhika Singha, '*A despotism of law*', pp. 60-5 for a discussion about the unpopularity of the religious oath required in colonial courts. Its imposition in a myriad judicial and official transactions seemed to reduce a form of religious judgement to a formulaic routine. The complaint that it put the respectable on the same level as their social inferiors, was discussed in chapter two.

⁴⁹ Cf. for instance, 'Government connection with idolatry in India', *Calcutta review*, January-June 1852, pp. 114-77.

⁵⁰ CONA, No. 96, 3 December 1841; and for the Bombay Presidency, COSFA, 15 October 1844, No. 310, prohibiting the superscription of 'Shri' or 'Har' on public records.

⁵¹ *Calcutta review*, January-June 1852, pp. 139-40. However this order did not apply to petitions presented to the court. CONA, 3 December 1841.

⁵² Cf. T. Pinney (ed.), *The letters of T.B. Macaulay*, III, 1976, p. 134. The Court of Directors warned that this was a delicate issue and people should not think that a disregard for religious obligation had been made a condition for office. Letter to India, Financial Department, 19 April 1837, No. 6, E/4/750, 5 April-31 May 1837, pp. 247-54. Nevertheless an 1857 publication reported triumphantly that 'the threat of expulsion from office enabled the Hindoo materially to curb those devotional excesses which amounted to mere form . . .', J.H. Stocqueler, *India under the British empire*, 1857, reprint, 1992, p. 148.

⁵³ 'Your lordship will perceive,' wrote the Law Commissioners, 'that the

by establishing the unquestionable position of the law, Macaulay argued, that the Company could exercise a uniform jurisdiction over all its territories and over all residents, Indian and British within it.⁵⁴ This idea dominated the choice of legal forms in which Macaulay cast the code.⁵⁵ The shift after 1833 to terming legislative measures Acts rather than regulations, Macaulay's insistence on framing Acts without preambles, i.e. as purely imperative rather than argumentative, the decision to frame a penal code rather than to compile a digest of existing regulations,⁵⁶ all these novelties were intended to dramatize the break with the past. In the classification of crimes the draft code emphasized the objective of defining each charge very distinctly.⁵⁷ In addition, 'Illustrations' were inserted along with every clause to curtail the possibility of varying judicial interpretations.⁵⁸

system of penal law which we propose is not a digest of any existing system, and that no existing system has furnished us even with a groundwork.' Indian Law Commissioners to GG in C, 14 October 1837, *PP*, 1837-38, vol. 41, pp. 465-6.

⁵⁴ Minute by T.B. Macaulay, 4 June 1835, BC F/4/1555, 1836-37, No. 63507.

⁵⁵ Cf. Eric Stokes, *The English utilitarians and India*, 1959, pp. 197-8. Also Macaulay, Minute, 11 May 1835, in C.D. Dharker, *Lord Macaulay's legislative minutes*, 1946, p. 145.

⁵⁶ Prinsep, another member of the Governor General's Council, objected that the Charter Act had merely suggested a gradual improvement of the existing law. Prinsep's minute, 11 June 1835, BC 1836-1837, F/4/1555, No. 63507. That the Council still accepted Macaulay's proposal for a penal code shows that reform sentiment had opened out space for a reconceptualization of the forms in which power was exercised.

⁵⁷ 'Every act which it is intended to make criminal ought to be separately defined; nor ought any indictment to be good which does not follow the words of some one of the definitions in the Code, nor ought any Culprit to be convicted whose act does not come distinctly under that definition.' Minute by T.B. Macaulay, 4 June 1835, BC 1836-37, F/4/1555, No. 63507. The Nizamat Adalat had also begun to criticize the loose framing of charges, the blending together of different offences, and the device of formulating a new charge under the head of 'miscellaneous offences'. Cf. *CONA*, 16 July 1824, No. 54, p. 121, and *COSFA*, 14 May 1824, No. 7, p. 4. Magistrates probably used these devices to secure conviction more easily. Campbell complained that the draft code had interfered too rudely with the classification of crimes. *Modern India*, p. 521.

⁵⁸ *PP*, 1837-38, vol. 41, p. 470. But Mill held that the illustrations were intended to make the law as intelligible and accessible as possible, and J. Clive concurs. J. Clive, *Thomas Babington Macaulay*, 1973, p. 445.

Despite such innovations of form it can be argued that the major changes in substantive law were limited, because so many conceptual battles had already been fought and won in this sphere.⁵⁹ Because of the lack of political will or incentive to adopt the code, it was consigned to various phases of reassessment. The Islamic law therefore continued to provide the Company with a nominal reference point for the punishment of offences not specifically legislated for, and in some desultory way the Company did not formally disavow the sovereignty of the Mughal emperor. The political push was provided by the 1857 rebellion — the Mughal emperor was brought to trial for treason in 1859,⁶⁰ and the Indian Penal Code was brought into operation in 1862.

An Enlightened Public

Macaulay had set out to codify the criminal law in India hoping it might induce the English to reform their own law as well.⁶¹ He supported the idea of European settlement in India to extend the influence of reform-minded opinion on the Company's administration.⁶² However, as I pointed out in the opening lines of this book, it was also the authoritarian nature of government in India which he relied on to give him room for his project of codification. In particular, the criminal law seemed to involve fewer 'interests and prejudices' than the civil law since it did not raise questions of property.⁶³ Does one conclude then that the only public opinion which the Government of India had to consider in penal legislation was that of the British public?

⁵⁹ Cf. Singha, 'A despotism of law', Ph.D., 1990.

⁶⁰ Cf. F.W. Buckler, 'The political theory of the Indian mutiny', for the contradictions within the Company's claims to sovereign right in India. *Transactions of the royal historical society*, 4th series, v, pp. 71-100.

⁶¹ Minute by T.B. Macaulay, 4 June 1835, BC F/4/1555, No. 63507, 1836-37; T.B. Macaulay to James Mill, 24 August 1835, in T. Pinney (ed.), *Letters of T.B. Macaulay*, pp. 146-7.

⁶² He held that the joint suffering of European settlers and Indians under inequities would galvanize reform. J. Clive, *Thomas Babington Macaulay*.

⁶³ Auckland approved of beginning with the penal Code in evolving a general judicial system for India: 'it is as well perhaps to begin with the branch of jurisprudence in which the fewest difficulties will be found and the fewest interests and prejudices concerned.' Auckland to President, Board of Control, 26 May 1837, Broughton Papers, Mss Eur F 213/9, p. 32. The Indian Law Commissioners remarked that there were not so many objections to innovations in penal legislation as to those affecting vested rights of property. Law Commissioners to GG in C, 14 October 1837, *PP*, 1837-38, vol. 41, p. 465.

Habermas suggested that the concept of the public opinion emerged in Europe in the eighteenth century in a specific social conjuncture in which the bourgeoisie was *vis-à-vis* absolutism.⁶⁴ In India of the 1830s the British, one element of which was sustained by the writings of sections of officialdom, discussed the extent to which a public could be actively created to support schemes of 'civilization'. It was important to graft upon the popular language of the East wrote C.E. Trevelyan, words for which it was difficult to find synonyms, such as virtue, honour, patriotism, and public spirit. In the course, the liberal ideal of creating a community of opinion around the printing press and public assembly was met with ambivalence in the context of political subjugation. Yet to come across statements that flows of commerce and communication from the metropolis would create conditions for the rise of an enlightened Indian public,⁶⁵ one index of social change being a shift in patterns of consumption and expenditure.

The address to an enlightened Indian public is evident in the developments I have already noted, gestures to associate reform with Indians with legal reform, as in their consultation by the British on police reform and the abolition of slavery, and to associate them with the judicial process in the appointment of assessors or 'even more nearly as a jury'.⁶⁶ Regulation 6 sought to provide native agency to the judge in appeals, evidence, but now an unpaid one in place of the Islamic *qazi*. It was also supposed to encourage a public opinion in the

judicial system.⁶⁹ However, whereas the Jury Acts of 1826 and 1832 formulated for the Supreme Courts in the Presidency towns had given real power to this agency,⁷⁰ Regulation 6 of 1832 for the Company's courts vested the decision exclusively with the judge.⁷¹ The measure therefore seems to have reserved the status of a truly impartial agency for the British judge, placing Indian assessors in a position of tutelage till they could, if this was ever possible, rise above the particularist ties of caste and community. In practice, 'respectable Indians' proved to be reluctant to serve as assessors, and the judge usually had to nominate them from the Indian officials and the vakils and *mukhtars* around the court.⁷² So public opinion, if it had a role to play, was still mediated through a variety of kinds of agency which had grown up around colonial rule in the *chamcheris*. Perhaps the strongly administrative environment in

⁶⁹ Cf. *COSFA*, 31 July 1838, p. 79. Yet some officials were very dismissive about the potential value of Indian public opinion, stating that they preferred the assistance of an employee with legal experience, responsible to government for his decisions. Cf. Lt. Colonel Galloway, *Observations*, 1832, second edition, pp. 297-8, for an unfavourable comparison of a trial by jury with one assisted by an Indian officer versed in the law. W. Blunt, a Bengal civil servant, argued that a jury would not have the skill of the law officers in tracing facts, and that they would not risk giving a verdict against someone dangerous or influential. Minute, 24 March 1831, in *PP*, 1831-32, vol. 12, Appendix 4, p. 508.

⁷⁰ The 1826 Jury Act for the Supreme Courts functioning under English law, had extended the right of sitting on juries to Indians. However Grand juries and juries for the trial of Christians were to consist entirely of Christians. A section of the Indian intelligentsia in Presidency towns organized petitions and publicity against this discriminatory provision, which led to its amendment in the Jury Act of 1832. Cf. J.K. Majumdar, *Progressive movements*, 1931, p. 352, 388.

⁷¹ Reg 6, s 3, cl 5, 1832. An article in the *Calcutta Review* argued that natives were 'not sufficiently advanced' to have the final verdict entrusted to them. 'Criminal Law in Bengal', *Calcutta Review*, July-December 1849, p. 536.

⁷² 'In fact the judge generally puts into the box some of the pleaders and such people about the court, in order to comply with the law, intimates to them very broadly his opinion, they always agree with him, and there is no more trouble.' G. Campbell, *Modern India*, London, 1852, p. 473. Judges were told they could not compel people to act as jurors but that Indian officers of the court could be called upon to serve and would have 'no reasonable ground for declining compliance'. CO No. 127 (n.d.) in Beaufort, *A digest*, second edition, 1, Calcutta, 1859, p. 152. Cf. also *CONA*, 28 December 1850, p. 448, to SJs that it was 'highly inexpedient' to compose a jury entirely of *vakils* or *mukhtars* or of less than three persons. *Mukhtars*: pleaders.

⁶⁴ Jurgen Habermas, 'The public sphere' (1964), in *New German Critique*, 1, 3 (Fall 1974), pp. 49-55.

⁶⁵ Cited in J. Clive, *Thomas Babington Macaulay*, p. 354.

⁶⁶ The 1854 committee to investigate torture by revenue and police in the Madras Presidency hoped 'the spread of education, the free communications, the increased intercourse of mind with mind' would prove the native character, otherwise inclined to exercise power over the weak. *Report of the commissioners for the investigation of torture*, Madras, 1854, p. 57, para 77. At the same time, this putative public was also supposed to register the superiority of Western science, political economy, Christianity, and to accept the need for tutelage under an enlightened despot.

⁶⁷ Bentinck referred to an increased demand for European goods and shifts in what one might term prestige expenditure, as evidence of a change in Indian society which made it safe to encourage European settlement on European terms, 30 May 1829, *CLWCB*, 1, p. 205.

⁶⁸ Reg 2, 1832.

which the institutions of colonial criminal justice took shape was more conducive to the proliferation of various legal services to guide the prosecutor or defendant, than to developing the broader social investment in working the law which underpinned the English jury system.⁷³ Nevertheless there is a rich social history of the law waiting to be explored here, one shaped by those whom British magistrates and judges characterized as touts, hangers on, *umeed-wars*, i.e. aspirants to office, and *babbaliyas*, paid witnesses.⁷⁴

Indian Bureaucracy and the Colonial Public

For many British officials, it was the subordinate Indian bureaucracy which seemed to offer the most accessible social field for generating a certain vision of colonial modernity.⁷⁵ Extending the

⁷³ In Madras a meeting of Indians had petitioned to be excused from the obligation to attend on a jury under the 1826 Act, citing various inconveniences, but also that they did not want to lose the benefit of counsel, either as defendants or prosecutors. J.K. Majumdar, *Progressive movements*, pp. 352-5. In the twentieth century a British judge said he had suggested that assessors be given greater power by not allowing an appeal upon the facts where their unanimous opinion was endorsed by the Sessions Judge. But to his surprise, Indian lawyers opposed this, referring to the 'imperfectly educated classes' from which the jury would be drawn. The working substitute for trial by jury in India he wrote, could be described as retrial upon record. T. Piggott, *Outlaws I have known and other reminiscences of an Indian judge*, Edinburg and London, William Blackwell and Sons Ltd., 1930, p. 55.

⁷⁴ Cf. third judge, Calcutta CC, to Regr, NA, 15 October 1800, BC F/4/98, referring to the highly practiced *babbaliyas* about Calcutta. W. Oldham described the Brahmins of village Tiwaripur in Ghazipur, as all professional witnesses. *Historical and statistical memoir of Ghazee-poor district*, 1, 1870, p. 48.

⁷⁵ C.E. Trevelyan hoped the English class at the Delhi Persian college would form 'the nucleus of a system . . . destined to change the moral aspect of the whole of Upper India', and the perspective of men of rank and influence around the environs of the Mughal court. Cf. C.E. Trevelyan's 'Memoir of Mohan Lal' in *Mohan Lal, travels in the Panjab, Afghanistan and Turkistan, in Balkh, Bokhara, and Herat and a visit to great Britain and Germany*, 1846, reprint, Language Department, Punjab, 1971. Thomason pressed for vernacular schools in villages so people would know their rights as recorded in revenue and settlement papers, but also to train patwaris in the rule governed management of revenue collection. Cf. R. Saumarez Smith, 'Rule-by-records and rule by reports: complementary aspects of British imperial rule of law'. *Contributions to Indian sociology*, 19, 1 (1985), pp. 153-76. In the other direction, a British official, asked to determine public feeling, or the opinion of 'respectable' natives on a particular measure, usually looked to the Indian functionaries of his court for an answer. Cf. I. Prichard, *Chronicles of Budgepore*.

use of native agency seemed to combine the utilitarian and liberal objectives of doing away with monopoly in public office and its concomitants, expense and inefficiency.⁷⁶ It was also canvassed as a means of winning public support for the legal system, on the grounds that it would make justice more easily available and speed the disposal of cases.⁷⁷ However there were limits to colonial expectations about a reconstructed Indian agency as the embryo of an enlightened public. At another level the driving imperative seemed to be that of controlling this agency more strictly, even as statistics and survey and record operations seemed to offer the technical means to do so.⁷⁸ Here the principle of European supervision over Indian subordinates also served a rhetorical function, that of associating the former with an avowedly transcendent, rule-governed public legality, through which the oriental excesses of the latter were monitored.⁷⁹ The issue of torture in revenue and police work provided one such ideological terrain for claims to be protecting Indians against despotic native functionaries. The British public seems to have been the focus of this rhetoric, but the state also addressed itself to an Indian public to assure it of the protection of law against misuse of official power. However, the supposed polarization between the outlook of European and Indian agency breaks down when we examine their institutional

Patwari: village record keeper, gradually drawn into the colonial revenue bureaucracy.

⁷⁶ Bentinck regarded the European civil service as a monopoly service, recruited through patronage. Bentinck to Charles Grant, 21 December 1832, CLWCB, II, p. 977.

⁷⁷ For instance, F.J. Shore, *Notes*, I, p. 258.

⁷⁸ Richard Saumarez Smith states that Thomason's new educational criteria for patwaris, and the compilation of manuals for them meant that they had their duties more tightly circumscribed from the mid-1840s. 'Rule-by-records and rule by reports'. Dirk Kolff points out that in the North-Western provinces, the impulse to collect revenue intelligence in the form of statistics and survey, originated in a paternalist instinct to safeguard the tie with the village community. However for some civil servants, the survey 'became an excuse for British megalomania', a proclamation of civilizational superiority. 'Administrative tradition and the dilemma of colonial rule: an example of the early 1830s', in D.H.A. Kolff and C.A. Bayly (eds), *Two colonial empires*, 1986, pp. 104-7.

⁷⁹ Among the crimes which Whitley Stokes listed as peculiar to India, were the 'torturing of peasants and witnesses'. Whitley Stokes, *The Anglo-Indian codes*, 2 vols, Oxford, 1887, vol. I, p. 71. This argument was developed in discussion with Ravi S. Vasudevan.

interdependence within a culture of authoritarian governance. I will be taking up the issue of police investigation and the recording of testimony in the magistrate's court to illustrate this point.

Reforming Agency

The utilitarian thrust of Macaulay's penal code, seeking to reduce executive and judicial discretion by defining laws more sharply, seemed to afford some limited scope for giving Indians a sense of legal right against official arbitrariness.⁸⁰ Subsequently, Act XXXI of 1841 gave parties to a criminal trial the right to make one appeal to a superior court, and Act XXXVIII of 1850 gave them the right to legal counsel.⁸¹ However, the hallmark of this period remained a preference for administrative solutions to control agency rather than substantial reform in judicial procedure, or provision for judicial redress. Two such issues in criminal justice were the unauthorized judicial power exercised by the police darogha in the mufassil, and the lack of supervision over the *muharrirs* who examined and recorded the depositions of the witnesses and prisoners brought to trial.⁸²

Discussions about police reform from the 1830s indicate considerable concern about the autonomy with which the darogha could arrest or release parties on bail, delay their trial, and shape their examination in court by his surathal and the confessions obtained in the mufassil.⁸³ Voluminous surathals were attributed

⁸⁰ The Law Commissioners suggested that precision in the definition of offences and clarification of the law of criminal procedure in the future would give the subject better protection against judicial and executive arbitrariness. Cf. Law Commissioners to GG Auckland, 14 October 1837, *PP*, vol. 41, p. 465. Yet an article in the *Calcutta review* on 'The Indian Code', argued that in India too great a facility to make criminal charges against public servants should not be permitted. Here public servants did take advantage of which was sometimes contrary to the law, but for public reasons, not malice. *Calcutta review*, xxvii (January-June 1857), pp. 47-80.

⁸¹ The right to counsel had been granted much earlier in 1839, under the jurisdiction of the Supreme Courts in the Presidency towns. In the *Calcutta review* courts an 1836 circular from the Nizamat Adalat had stated that parties to a sessions court could take the advice of vakils, but these could not appear before the judge or intervene in the proceedings. Cf. T.K. Banerjee, *Ground to Indian criminal law*, 1963, p. 236. In England it was from the eighteenth century that defence counsel had begun to sharpen notions of the rights of the accused in the trial. J. Beattie, 'Garrow for the ages', *History today*, 1991, pp. 49-53.

⁸² *Muharrirs*: writers, scribes.

both to incompetence and presumption, 'native love of writing and parade of office',⁸⁴ but also to corruption and coercion.⁸⁵ The Superintendent of Police for the Lower Provinces urged a curtailment of this document, arguing that 'it would place the magistrate's courts on a better footing as being the judicial tribunals in the first instance, and render them not so dependant as they are now, on the proceeding of their police. . . .'⁸⁶

However, in 1854-5 the judicial standing of what were termed mufassil or thana confessions also came to be associated with a controversy over the use of torture to obtain them.⁸⁷ As Douglas Peers points out, the Torture Enquiry Committee set up in the Madras Presidency exposed the degree of independence with which Indian subordinates operated.⁸⁸ The Torture Committee's primary address was to the British public, to reassure them that the natives could not possibly believe that European functionaries condoned torture: 'the whole cry of the people . . . is to save them from the cruelties of their fellow Natives. . . .'⁸⁹ Its concern was also less about facilitating criminal charges against officials than finding administrative remedies to protect the credibility of police evidence.⁹⁰

⁸³ For instance, 'The district officer, N.W.P., his miscellaneous duties', *Calcutta review*, xxvii (January-June 1857), pp. 109-28, criticizing the form of police enquiry for the powers it gave to the darogha.

⁸⁴ R. Spankie, Magt Saharanpur, to Offg Secy NWP Govt, 17 June 1856, Pre-Mutiny, Misc, Judicial letters issued, 1856-57, vol. 242, RAA. Also report of SP, LP, 16 November 1841, commenting on the 'inutility' of the voluminous recording of mufassil confessions, cited in *CONA* to magistrates, LP, 16 June 1843, No. 138, *Circular orders*, pp. 347-8.

⁸⁵ Cf. 'The district officer', *Calcutta review*, xxvii (January-June 1857), drawing attention to police torture to secure convictions.

⁸⁶ SP, LP, 16 November 1841, in *CONA*, No. 138, 16 June 1843, *Circular orders*, pp. 347-8. The 1838 police committee for Bengal had suggested that the surathal be discontinued and proceedings at the thana and under the magistrate be abbreviated. *Committee on the mofussil police*, Bengal, 1838, pp. 25-6, paras 70-4. Also *Calcutta review*, vi, xi (July-December 1846), pp. 135-69, on the necessity of streamlining the darogha's reports.

⁸⁷ The original issue related to use of torture in revenue collection in the Madras Presidency, but interestingly, the Government of India asked that the terms of the enquiry be extended to cover torture to obtain confessions in police work. *Report of the commissioners for the investigation of torture*, 1855, part 1. Thana: police sub-station.

⁸⁸ Douglas M. Peers, 'Torture, the police, and the colonial state in the Madras Presidency, 1816-55', *Criminal justice history*, 12 (1991), pp. 29-56.

⁸⁹ *Report of the commissioners for the investigation of torture*, part 1.

⁹⁰ In the 1850s two police circulars outlined procedures to monitor the

The Inquisitorial Form and Subordinate Agency

The procedural check on police proceedings was supposed to lie in the magistrate's examination of the prisoner and other witnesses, and the reiteration of any mufassil confession before him.⁹¹ What has to be noted at this point is the inquisitorial form of the trial in India as compared with the more adversarial form, to use the terms which distinguish the Continental system of trial from the English one.⁹² The magistrate was to examine the parties to come to some conclusion about their guilt or innocence, with few restrictions on the kind of questions he could put to them,⁹³ and he was both prosecutor and judge for the majority of cases brought before him.⁹⁴ The judicial powers of the colonial magistrate were therefore more extensive than those of the British Justice of Peace, and in sending up a case to the higher court for trial he had a much greater responsibility to ensure that there was enough evidence to render conviction probable.⁹⁵ The efficiency of the magistrate was usually deduced from the proportion of acquittals to

length of the prisoner's detention by the darogha, and to guard against the mufassil confession being used as a basis for the prisoner's examination in the magistrate's court. Cf. CO, SP, LP No. 6 of 1853, and CO, SP, WP, 21 June 1855, in F.L. Beaufort, *A digest of criminal law*, part I, 1857, p. 123.

⁹¹ A former judge in the Bengal Presidency, Melville, admitted that since the evidence of the witness was written down in Persian, and not usually read back to him in his own language, he could not check it for any discrepancies, 'it is the duty of the presiding judge to take care of that.' However, by a special order, confessions were recorded in the language in which they had been delivered. Evidence of W.L. Melville, 12 April 1832, PP, 1831-32, vol. 12, pp. 61-2.

⁹² T. Piggot commented that the functions of the magistrate in India were closer to those of a French Judge d' Instruction than those of the English magistrate. *Outlaws I have known*, 1930, pp. 54-5.

⁹³ G. Campbell, *Modern India*, pp. 479-81. And Campbell strongly endorsed this system, criticizing proposals to restrict self-incrimination. He held that the magistrate could be counted on to ensure that the innocent were let off. *Ibid.*, p. 481.

⁹⁴ 'The district officer, N.W.P., his miscellaneous duties', *Calcutta review*, xxviii (January-June 1857), p. 116. *Modern India*, pp. 472-82.

⁹⁵ Cf. Regulation VIII, 1830; and CONA, 16 July 1830. 'It is an exceedingly mistaken notion to take evidence sufficient only to warrant committal, for the Officer submitting a case to the Court, should always consider himself somewhat in the light of a public prosecutor, and should not therefore leave anything undone'. COSFA, 19 April 1822, Nos 2-3, *Circulars passed by the Sudder Faujdari Adawlut*, I, Bombay, p. 2.

convictions. The system of prosecution was therefore such that it was far more convenient for the magistrate to accept a confession obtained in the police thana, especially if supported by circumstantial evidence, than to enquire into the coercion exerted to secure it.

Moreover the sheer pressure of business, and the limited proficiency of magistrates in the vernacular languages, meant that the actual duration of their examination was very limited, except in an important case. Time and again the superior court issued circulars instructing the magistrate not to allow the mufassil confession secured by the darogha to be recorded as a confession made before him, or to permit the court muharrirs to record depositions in a separate room or even in the magistrate's absence.⁹⁶ Shore contended that the parties to a trial were seldom examined personally by the magistrate.⁹⁷ They were handed over to the writers of the court, who would question them in Hindustani and record their answers in Persian, after which the case was considered 'prepared' for the magistrate's perusal:

Meanwhile . . . part of his [the magistrate's] time is devoted to hearing cases that have been prepared . . . the prisoners are placed before him; the prosecutors and witnesses are successively pushed or dragged into the room; the Koran, or bottle of dirty water (supposed to be that of the Ganges) is placed in their hands; and the depositions of the whole gabbled over as fast as possible in Persian. . . . Sometimes the crowd is so great, that a witness is not brought up to his place, until just as the concluding words of his evidence are being read.⁹⁸

⁹⁶ CONA, 23 August 1810; CONA to Comms of Circuit, 16 July 1830, No. 54, and CONA to SJs, 4 May 1832, No. 103, in *Circular orders*, pp. 119-24, 145. CONA, 27 January 1837, No. 220 directing that witnesses or prisoners ought to be examined 'exclusively and entirely' in the presence of the officer vested with criminal jurisdiction. COSFA, 19 April 1841, No. 238, p. 125 criticizing the practice of deputing subordinates to take evidence to save the trouble of conducting a trial. Cf. also 'Administration of criminal justice in Bengal', *Calcutta review*, vi, xi (July-December 1846), p. 171, stressing the need to supervise the muharrirs who took down depositions. *Muharrirs*: writers, recorders.

⁹⁷ F.J. Shore, *Notes*, I, p. 37. In his evidence before the Select committee W.L. Melville admitted that in smaller offences evidence was delivered in the presence of the judge, but not necessarily in his hearing, as he could not superintend its recording in each trial. 12 April 1832, PP, 1831-32, vol. 12, p. 62.

⁹⁸ *Ibid.* In 1837 the muharrirs were instructed to record depositions in the language in which they had been delivered. Cf. CONA, 27 January 1837, No. 220, *Circular orders*, p. 204. *Notes*, I, pp. 239-40.

The process of examination seems to have been directed towards standardizing cases so that the magistrate could get through a large number rapidly, not towards ensuring that the defendant or witness could check the recording of their testimony. So in fact the deposition writers could also influence the shaping of a case. At the ground level therefore, the extension of the judicial powers of Indian agency might be viewed as a measure to replace defacto power with formal responsibility.⁹⁹

While structurally dependent on the subordinate Indian bureaucracy, the colonial state could nevertheless intervene in the indices of social status by redefining the requirements of office. The service literati could come to feel, as Saiyid Ahmed Khan describes, that they would have to demonstrate an 'enlightened' outlook, extending into features of their domestic life, as a condition for employment, even if this made them vulnerable about their respectability.¹⁰⁰ Official patronage for Arabic and Persian learning, and the opportunity this gave to the Muslim service literati to find employment in the courts, were important affirmations of their social niche as a cultivated elite.¹⁰¹ Admittedly, a knowledge of the regulations

⁹⁹ 'As from year to year, we must give them power, it becomes necessary to raise them in dignity and character.' Auckland to Hobhouse, 5 August 1837, about increasing the opportunities for Indians in the judicial service. Broughton papers, F 213/9. In his 1831 communication to the Select Committee of Parliament, Rammohun Roy had warned of the dangers of the judge's dependence upon native officers, 'meanly situated' in rank and pay, who were not responsible to the government or the public for the accuracy of their decisions. 'Questions and answers on the judicial system of India', pp. 12, 18.

¹⁰⁰ He referred to a circular which a missionary, Mr Edmond, sent to the principal Indian officials of every station, saying that with Hindustan under one rule, and soon to be connected by telegraph and railway, everyone should be of the same faith as well. Amidst rumours that Government servants would be the first to be made Christians, Indian officials, out of a sense of shame, would deny having received the circular. Saiyid Ahmed Khan, *Ashad-i-Baghawat-i-Hind*, 1982, Appendix A, pp. 165-7. Avril Powell gives an absorbing description of the concern registered by the Muslim ashraf in the 1840s, that if they entered into public debate with the missionaries, it might jeopardize judicial employment. *Muslims and missionaries in pre-mutiny India*, 1993, pp. 179-87.

¹⁰¹ F.J. Stephen said he had been told that an older generation of British civilians considered the post of Islamic law officer as a 'piece of preferment which the Mohammedans as a class greatly valued.' F.J. Stephen, *A history of the criminal law of England*, III, p. 297.

had come to be more relevant in the day to day business of the courts than Islamic jurisprudence.¹⁰² However when a certificate from a government school, with provision only for education in the vernacular languages and in English, and an examination in the regulations was projected as a criteria for judicial office, it raised the possibility of 'new men' breaching a privileged space. It also seemed to discourage the study of Islamic jurisprudence, by reducing its public standing.¹⁰³ A petition from Bihar complained that the replacement of Persian by the vernaculars as the language of record in the courts, would reduce those who might have studied Persian 'to a state of uncivilisation like *putwaries* and cultivators . . .'¹⁰⁴

I have argued that in the era of liberal reform, debates about the forms of public authority sharpened to a new pitch. Government searched after a public which would endorse the new ideological co-ordinates of rule. Of the possible locations for support the most stable seemed to be that of British public opinion. This public provided the push for certain legal initiatives, as in the measures to withdraw official countenance from Hindu religious ceremonies, but it could also hold the state accountable, at least notionally, to a certain liberal agenda, as on the question of slavery. The discussions which British residents in India, official and non-official, engaged in through the English press, brought this sense of a public closer

¹⁰² Cf. for instance, evidence of W.M. Fleming, formerly second judge CC, Patna, in PP, 1830, vol. 6, p. 71; COD to Bengal, Public Dept, 29 September 1830, PP, 1831-32, vol. 9, appendix, p. 497; evidence of R.N.C. Hamilton, 13 April 1832, formerly Magistrate Banaras, PP, 1831-32, vol. 13, p. 78, para 870.

¹⁰³ Saiyid Ahmed Khan said the proclamation that students of Government colleges were to have priority in public appointments and the neglect of Arabic and Persian created an unease in men of his class. *Ashad-i-Baghawat-i-Hind*, Appendix A, pp. 165-7. However serving Islamic law officers were considered eligible for the higher judicial post of Sadar Amin without having to sit for an examination or serve in the subordinate office of munsiff. R.C. Srivastava, *Development of judicial system in India under the East India Company*, 1971, p. 33.

¹⁰⁴ Petition from inhabitants of Province of Bihar bearing about 150 Persian signatures, Home Judl Cons, No. 7, 28 June 1841, cited in R.C. Srivastava, *Development of the judicial system*, pp. 199-201. At one point the petition specifically said it represented the opinion of 'Mahomedan Landholders and incumbents of the Courts' and urged government not to support the views 'of a set of uneducated men'. Ibid.

to the decision-making of the Company's government. But this British public was itself in the process of transformation, and India often provided an exploratory terrain for schemes to reconstitute order and political legitimacy in the metropolis and other colonial territories as well.

Government took some very limited measures to foster a non-bureaucratic public in India, but many officials dismissed such hopes as unrealizable in a society which, in their estimation, was far too fractured by community feeling. The emergence of an enlightened Indian public, insofar as it entered into official calculations, was conceived of as one which would view the absolutism of the state, not as an object of criticism, but as a guarantor of even-handed treatment against too narrow a formulation of race interest, against the various particularisms of Indian society, and the oppression of Indian agency. It was this same Indian agency, however, that Government also viewed as a promising starting point for generating an informed appreciation of the changes being contemplated. In the judicial sphere this was broached through an effort to remodel the forms of knowledge, language of business, and functions which would be performed by the subordinate bureaucracy. The effectiveness of reform, in this line of reasoning, would depend primarily upon the control which government could exercise over its Indian employees.

However, I have suggested that a more practical set of adjustments with Indian agency also continued to underwrite the institutions of public authority. In addition, even at the peak of enthusiasm for liberal reform, the consciousness of another sort of Indian public opinion constantly figured in official pronouncements. This was not the enlightened public yet to emerge, but a traditionally conceived one, to be reassured of the continued salience of caste and rank in procedures of governance.¹⁰⁵ Initiatives to move towards a more transcendent, more 'truly neutral' order of public authority could make Indian elites feel that they were now excessively vulnerable to onslaughts of 'reform' whose implications seemed to challenge their position in terms of landholding rights, status, and official patronage. The compensation offered, a sharper legal definition of rights and claims, did not always

¹⁰⁵ This was also a matter of reassuring conservative sections of British officialdom that there was no reckless jettisoning of the administrative traditions of the past.

outweigh the loss of special consideration in procedures of public authority.

Under the strain of the frontier wars, and a flurry of reactions from sections of the elite of North India, Government retracted to make some concessions to categories of caste and rank but on more sharply defined terms. As colonial rule lurched between traditional and enlightened formulations of the Indian public, its relationship with the Indian elite assumed a layered, palimpsest-like appearance. It persisted with the effort to place rule of law in a dominant position among the symbols of sovereignty, but in a piecemeal way and with a more authoritarian visage. In a sense, the effort to put public authority on a footing of 'true neutrality', and to move towards a more authoritative exposition of rule of law, actually introduced a greater rigidity to the terms on which the government categorized caste, rank and community. From this perspective, the post-1857 phenomenon of a code of criminal law and procedure, and police reform, coexisting with caste censuses and criteria of community in the field of employment emerge as the elaboration of a more long-term set of contradictions within British rule.

Bibliography

Hindi

- Amritlal Nagar (trans.), 1986. Vishnu Bhatt Godse, *Aankhon se gadar* (Marathi), Delhi, Rajpal and Sons.
- Pandey, Badrinath, 1932, 1990. *Kumaon ka itihās* (Hindi), Aligarh, Shyam Prakash.

Translations into English

- Abul Fazl, 1891. *The Ain-i-Akbari* (trans. H.S. Jarrett), Calcutta, Calcutta University Press.
- Bilimoria, J.H. (trans.), 1972. *Ruka'at-i-Alamgiri*, IAD, Oriental Series, No. 12, Delhi.
- Chandra, Satish (trans.), 1972. *Letters of a king-maker of the sixteenth century (Balmukund Nama)*, Aligarh, Aligarh Muslim University.
- Garret, H.L.O. and G.L. Chopra (eds), 1970. *Events at the court of Aurangzeb, 1810-1817*, 1935, reprint, Punjab Government Records and Publications. (Translation of Persian newsletters.)
- Gholam Husain, Khan, Saiyid, 1789, 1975. *Seir Mutaqarriin*, history of the later Mughals, 4 vols (trans.), Nota Manus, reprint, Lahore.
- Hoey, W. (trans.), 1885, 1974. *Tafzihu'l Ghafilin, a history of the reign of Daula, Nawab Vizier of Oudh*, new edition, Lucknow.
- Husain, S.M.A. (ed.), 1982. *Kalimat-i-Taiyibat* (Selected Ta'aruf of Aurangzeb), Delhi, 1982.
- Khan, Khair-ud-din, 1875. *Tuhfa-i-Taza*, The Bulwuntnama (trans. F. Curwen), Allahabad.
- Khan, Saiyid Ahmed, 1858. *Asbab-i-Baghawat-i-Hind* (trans. with introduction by Hafeez Malik and Morris Dembo), *History of the Bijoor rebellion*, Delhi.
- Khan, Sarfaraz Husain (trans.), 1919. 'Translation of Maharaja Jai Singh's Khulasat-ul-Tawarikh', *Journal of the Bihar and Orissa Research Society*, v, ii.
- Hyder, Q. (trans.), 1993. *The dancing girl*, Hasan Shah, 1790, A. Directions Book.
- Lokhandwala, M.F. (trans.), 1965. *Mirat-i-Ahmadi: A Persian History*

of Gujarat, Ali Muhammad Khan, Gaekwad's Oriental Series, 146, Baroda.

- Salam, Abdus (trans.), 1902. *The Riyazu-s-Salatim*, by Ghulam Husain Salim, Calcutta.
- Sarkar, Jadu Nath (trans.), 1952. *Bengal Nawabs*, Azad-al-Husaini Nau-bahar-i-Murshid Quli Khan, Sir William Jones Bicentenary Series, Calcutta, Asiatic Society.
- (trans.), 1947. *Maasir-i-Alamgiri*, of Saqi Must'ad Khan, Calcutta.
- Sharar, Abdul Halim, *Guzashta mashriqi tamaddum ka ahkri namunah*, F.S. Harcourt and Fakhir Hussain (trans. and eds), Lucknow, the last phase of an oriental culture, New Delhi, 1993.
- Suri, V.S. (trans.), 1961. *Umdat-ul-Tawarikh*, Daftar III, parts I-IV, by Lala Sohan Lal Suri, New Delhi, S. Chand and Co.
- Syed, Anees Jahan, 1977. *Aurangzeb in Muntakhab al Lubab (Khafi Khan)*, Bombay.

Books and Articles

- Acland, C., 1879. *A popular account of the manners and customs of India*, new edition, London.
- Adas, M., 1990. *Machines as the measure of men: Science, technology and ideas of western dominance*, Cornell University Press.
- Alam, M., 1986. *The crisis of empire in Mughal North India, Awadh and the Punjab 1707-1748*, Delhi, OUP.
- Alavi, Seema, 1995. *The sepoys and the Company, tradition and transition in Northern India, 1770-1830*, Delhi, OUP.
- Ali, Athar M., 1968. *The Mughal nobility under Aurangzeb*, Bombay.
- Ali, Mrs Meer Hasan, 1832. *Observations on the musulmauns of India*, London.
- Anderson, Michael, 1993. 'Work construed: Ideological origins of labour law in British India to 1918', in P. Robb (ed.), *Dalit movements and the meanings of labour in India*, Delhi, OUP.
- Appadurai, A., 1981. *Worship and conflict under colonial rule. A South Indian case*, Cambridge, CUP.
- Arnold, D., 1993. *Colonizing the body, state medicine and epidemic disease in nineteenth century India*, Delhi.
- (ed.), 1994. *Subaltern studies*, Delhi, OUP.
- Aspinall, A., 1931. *Cornwallis in Bengal: The administrative and judicial reforms of Lord Cornwallis in Bengal, together with accounts of the commercial expansion of the E.I. Company, 1786-93, and of the foundation of Penang, 1786-93*, Manchester, Manchester University Press.

- Babb, L.A., 1975. *The divine hierarchy: Popular Hinduism in India*, New York and London, Columbia University Press.
- Bacon, T., 1837. *First impressions and studies from nature in Hindostan* (1831-36), 2 vols, London, W.H. Allen.
- Badenach, W., 1826. *Inquiry into the state of the Indian army and suggestions for its improvement and the establishment of a police for India*, London.
- Bailey, V., 1981. *Policing and punishment in nineteenth century Britain*, London.
- Balfour, E., 1844. 'On the migratory tribes of natives in central India', *JRAS*, 13, part 1.
- Banaji, D.R., 1933. *Slavery in British India*, Bombay.
- Banerjee, T.K., 1963. *Background to Indian criminal law*, Calcutta.
- Banerji, D.N., 1943. *Early administration of the East India Company in Bengal*, Madras, Longman.
- Bannerji, T., 1970. *A history of trade barriers in British India*, vol. 1, Calcutta.
- Barat, A., 1962. *The Bengal native infantry, its organisation and discipline 1796-1852*, Calcutta.
- Barker, F. et al. (eds), 1985. *Europe and its others*, 2 vols, University of Essex, Essex.
- Barnett, R.B., 1980. *North India between empires: Awadh, the Marathas and the British, 1720-1801*, Berkeley.
- Bayly, C.A. and S., 1988. 'Eighteenth-century state forms and the economy', in C. Dewey (ed.), *Arrested development in India, the historical dimension*, Delhi.
- Bayly, C.A., 1981. 'From ritual to ceremony: Death ritual and society in Hindu North India since 1600', in J. Whaley (ed.), *Mirrors of mortality, studies in the social history of death*, London, Europa Publications.
- 1982. 'The small town and Islamic gentry in north India: The case of Kara', K. Ballhatchet and J. Harrison (eds), *The city in South Asia*, London, University of London.
- 1983. *Rulers townsmen and bazaars: North Indian society in the age of British expansion*, Cambridge, CUP.
- 1988. *The New Cambridge History of India, II.1: Indian society and the making of the British empire*, Cambridge.
- 1989. *Imperial meridian: The British empire and the world, 1780-1830*, Studies in Modern History, Singapore, Longman.
- 1991. *An illustrated history of modern India, 1600-1947*, Bombay, Calcutta, Pearson.
- 1993. 'Knowing the country: Empire and information', *MAS*, 27, 1.

- Bayly, C.A., 1994. 'Returning the British to South Asian history, the limits of colonial hegemony', *South Asia*, xvii, 2.
- 1996. 'Colonial rule and the "informational order" in South Asia', in Nigel Crook (ed.), *The transmission of knowledge in South Asia*, Delhi, OUP.
- Baynes, C.R., 1854. *Hints on medical jurisprudence*, Madras.
- Beames, J., 1961. *Memoirs of a Bengal civilian*, Chatto and Windus.
- Bearce, G.D., 1961. *British attitudes towards India, 1784-1858*, Oxford.
- Beattie, J.M., 1986. *Crime and the courts in England, 1660-1800*, Oxford.
- 1991. 'Garrow for the defence', *History today*.
- Beaufort, F.L., 1857. *A digest of criminal law of the presidency of Fort William and guide to all criminal authorities therein*, part 1, Calcutta.
- Beier, A.L., 1985. *Masterless men, the vagrancy problem in England*, London.
- Bellew, Captain, 1843. *Memoirs of a Griffin: Or a cadet's first year in India*, London.
- Bennet, W.C., 1870. *A report on the family history of the chief clans of the Roy Bareilly district*, London.
- Bernstein, H.T., 1960. *Steamboats on the Ganges*, Calcutta.
- Bevan, H., 1839. *Thirty years in India*, vol. 1, London.
- Bhattacharya, N., 1986. 'Colonial state and agrarian society', in S. Bhattacharya and R. Thapar (eds), *Situating Indian History*, Delhi.
- Blackburn, S.H., 1978. 'The Kallars: A Tamil "criminal tribe" reconsidered', *South Asia*, new series, 1, 1 (March).
- Blair, C. 1874, 1984. *Indian famines, their historical, financial and other aspects*, reprint, New Delhi, Agricole Corporation.
- Bloch, M. and Parry, J., 1982. *Death and the regeneration of life*, Cambridge, CUP.
- Blum, J., 1978. *The end of the old order in rural Europe*, Princeton.
- Bolts, W., 1772. *Considerations on Indian affairs*, London.
- Brown, P., 1975. 'Society and the supernatural: A medieval change', *Daedalus*, 104, 2 (Spring).
- Bruce, G., 1968. *The stranglers: The cult of thuggee and its overthrow in British India*, London.
- Buchanan, F., 1937 edition. *An account of the districts of Bihar and Patna in 1811-12*, Patna, Bihar and Orissa Research Society.
- Bhatnagar, G.D., 1968. *Awadh under Wajid 'Ali Shah*, Varanasi.
- Briggs, J., Capt, 1819. 'Account of the origin, history and manners of the race of men called Bunjaras', *Bombay Transactions*, 1.
- Brockman, E.G. Drake, 1904. *Notes on the early judicial administration of the district of Midnapore*, Calcutta.

- Brown, J., 1984. *Modern India: The origins of an Asian democracy*, New Delhi, New York, New Delhi.
- Buckler, F.W., 1922. 'Political theory of the Indian Mutiny', *actions of the Royal Historical Society*, 4th series, v.
- Burton, R.F., 1851. *Sind and the races that inhabit the valley of the Indus*, reprint, Karachi, 1973.
- Bute, Marchioness of (ed.), 1858. *The private journal of the marchioness of Hastings*, 2 vols, 2nd edition, London.
- Buyers, W., 1848. *Recollections of Northern India*, London.
- Cadell, P., 1938. *History of the Bombay army*, London.
- Calkins, P., 1970. 'The formation of a regionally oriented ruling group in Bengal 1700-40', *JAS*, xxiv.
- Campbell, G., 1852. *Modern India: A sketch of the system of civil government*, London.
- 1893. *Memoirs of my Indian career*, C.E. Bernard (ed.), 2 vols, London.
- Campbell, R.J.R., 1857. *The Indian mutiny: Its causes and results*, London.
- Carey, W.H., 1907. *The good old days of John Company*, Calcutta.
- Cassels, N.G., 1988. 'Social legislation under the Company Raj: The abolition of slavery Act V of 1843', *South Asia*, new series, 11 (June).
- Chakrabarty, Dipesh, 1994. 'The difference-deferral of a colonial modernity: Public debates on domesticity in British Bengal', *Subaltern studies*, viii, Delhi, OUP.
- 1995. 'Radical histories and question of enlightenment rationalism: some recent critiques of *Subaltern studies*', *EPW*, xxx, 14, 80-90.
- Chatterjee, B., 1983. 'Cornwallis and the emergence of colonial police in Bengal past and present', July-December.
- Chatterji, A., 1967. *Bengal in the reign of Aurangzib*, Calcutta.
- Chatterji, Partha, 1993. *The nation and its fragments: Colonial and post-colonial histories*, Princeton, Princeton University Press.
- Chattopadhyay, B., 1983. 'Cornwallis and the emergence of colonial police', *Bengal past and present*, cii, 2, 195 (July-December).
- Chaudhuri, N., 1994. 'Memsahibs and their servants in nineteenth-century India', *Women's History Review*, 3, 4.
- Chaudhuri, S., 1976. 'Sati as a social institution and the Mughal Empire', *Indian History Congress*, 37th session, Calicut.
- Chevers, N., 1854. 'Report on medical jurisprudence in the Bengal Presidency', *Indian Annals of Medical Science*, October.
- 1870. *A manual of medical jurisprudence in India including an outline of a history of crime against the person in India*, Calcutta.
- Chopra, G.L., 1960. *Punjab as a sovereign state (1799-1839)*, Hoshiarpur, second edition.
- Clive, J., 1973. *Thomas Babington Macaulay: The shaping of the historian*, London, Secker and Warburg.
- Cohn, B., 1987. *An anthropologist among the historians, and other essays*, Delhi, OUP.
- Cole, J.R.I., 1988. *Roots of north Indian Shi'ism in Iran and Iraq: Religion and state in Awadh, 1722-1859*, Berkeley and Los Angeles, University of California Press.
- Collet, Sophia Dobson, 1988. *The life and times of Rammohun Roy*, D.K. Biswas and P.C. Ganguly (eds), Calcutta, Sadharan Brahmo Samaj.
- Constable, A. (ed.), 1968. F. Bernier, *Travels in the Mughal Empire AD 1656-1668*, New Delhi.
- Cooper, F. and A.L. Stoler, 1989. 'Tensions of empire: Colonial control and visions of rule', *American ethnologist*, 16, 4 (November).
- Cotton, H.J.S., 1880. *Memorandum on the revenue history of Chittagong*, Calcutta.
- Cullen, M.J., 1975. *The statistical movement in early Victorian Britain*, New York.
- Curly, D.L., 1977. 'Fair grain markets and Mughal famine policy in late eighteenth century Bengal', *Calcutta Historical Journal*, ii.
- Dalmia-Luderitz, V., 1992. 'Sati as a religious rite, Parliamentary papers on widow-immolation, 1821-30', *EPW*, 25 January 1992.
- Davies, A.M., 1988. *Life and times of Warren Hastings*, 1935, reprint, Delhi, Gian Publishing House.
- Davis, B.D., 1981. 'British emancipation as a moral dispensation' in 'Humanitarianism or control', *Rice University Studies* (Winter), vol. 67, no. 1.
- Davis, N.Z., 1987. *Fiction in the archives, pardon tales and their tellers in sixteenth-century France*, Polity Press.
- Derret, J.D.M., 1968. *Religion, law and the state in India*, London.
- Deyell, J.S. and R.E. Frykenburg, 1982. 'Sovereignty and the "sikka" under Company Raj: Minting prerogative and imperial legitimacy in India', *IESHR*, xix (January-March).
- Dhagamwar, V., 1992. *Law, power and justice, the protection of personal rights in the Indian Penal Code*, second edition, New Delhi, Sage.
- Dharker, C.D., 1946. *Lord Macaulay's legislative minutes*, OUP.
- Dirks, N., 1987. *The hollow crown: Ethnohistory of an Indian Kingdom*, Cambridge, CUP.
- Dow, A., 1770, 1803. *The history of Hindostan*, vol. 1, London.

- D'Oyly, C., 1813. *The European in India*, London.
- Dunbar, J. (ed.), 1988. *Tigers, durbars and kings, Fanny Eden's journals, 1837-38*, London.
- Eden, E., 1983. *Up the country: Letters from India*, reprint, Virago.
- Edwardes, M., 1857. *My Indian mutiny diary*, London, Cassell Company Ltd.
- Elias, Norbert, 1939. *State formation and civilisation*, 1982 edition.
- Embree, A., 1962. *Charles Grant and British rule in India*, London.
- Firminger, W.K., 1917. *The fifth report from the select committee of the House of Commons on the affairs of the East India Company*, Calcutta.
- Fisch, J., 1983. *Cheap lives and dear limbs: The British transformation of the Bengal criminal law 1769-1817*, Wiesbaden.
- Fitzclarence, Lt. Col., 1819. *Journal of a route across India, through Egypt to England in the latter end of the year 1817, and the beginning of 1818*, London.
- Forbes, J., 1813. *Oriental Memoirs: Selected and abridged from letters written during seventeen years residence in India*, 4 vols, London.
- Foucault, Michel, 1977. *Discipline and punish: The birth of the prison*, Harmondsworth.
- Francis, C.R., 1848. *Sketches of native life in India*, London.
- Freitag, S. (ed.), 1989. *Culture and power in Banaras: Communal performance, and environment, 1800-1980*, Berkeley and Los Angeles, University of California.
- 1991. 'Crime in the social order of colonial North India', *MAS*, 25, 2.
- French, C.J., 1854. *Journal of a tour in upper Hindustan performed during the years 1838-1839*, Agra, Agra Messenger Press.
- Frykenburg, R.E., 1969. *Land control and social structure in Indian history*, Madison, University of Wisconsin.
- 1977. 'Company circari in the Carnatic, c. 1799-1859: The inner logic of political systems in India', in R.G. Fox, *Realm and region in traditional India*, Delhi.
- Galloway, A., 1832. *Observations on the law, constitution and present government of India*, 2nd edition, London.
- Gibson, I., 1978. *The English vice, beating, sex and shame in Victorian England and after*, London.
- Gleig, G.R., 1841. *Memoirs of the life of Warren Hastings*, London.
- Gordon, S., 1978. 'The slow conquest: Administrative integration of Malwa into the Maratha empire, 1720-60', *MAS*, 11, 1 (1977).
- 1969. 'Scarf and sword: Thugs, marauders, and state-formation in eighteenth century Malwa', *IESHR*, 4 (December).
- Guha, R., 1963. *A rule of property for Bengal*, Paris.
- 'Dominance without hegemony and its historiography', *Subaltern studies*, vi, Delhi, OUP.
- Gune, V.T., 1952. *The judicial system of the Marathas*, Deccan College dissertation series, Poona.
- Guthrie, Mrs, 1881. *Life in western India*, 2 vols, London.
- Habermas, J., 1974. 'The public sphere', *New German Critique*, 1, 3 (Fall).
- Hamilton, W., 1820, 1971. *Geographical, statistical and historical description of Hindostan and the adjacent territories*, Delhi.
- Hand, J.R., 1894. *Early English administration of Bihar*, Calcutta, Bengal Secretariat Press.
- Harfield, Major A.G., 1982. 'Fort Cornwallis, Pulo Pinang', in *Journal of the Society for Army Historical Research*, vol. LX (Summer), No. 242.
- Harington, J.H., 1805-1817. *An elementary analysis of the laws and regulations enacted by the Governor General in Council at Fort William in Bengal for the civil government of the British territories in that Presidency*, vol. 1, Calcutta.
- Haskell, A., 1985-86. 'Capitalism and the origins of the humanitarian sensibility', *American Historical Review*, parts I and II, 90, 2 (April 1985), and 90, 3 (July 1986).
- Hastings, W., 1782. *A narrative of the late transactions at Benares*, London.
- Hawthorne, G., 1987. *Enlightenment and despair*, Cambridge.
- Hay, D., 1982. 'War, dearth and theft in the eighteenth century: The record of the English courts', *Past and Present*, 95 (May).
- Heber, R., 1843. *Narrative of a journey through the upper provinces of India, from Calcutta to Bombay: 1824-1825*, London.
- Heesterman, J.C., 1985. *The inner conflict of tradition: Essays in Indian rituals, kingship and society*, Chicago, University of Chicago Press.
- Hervey, C., 1892. *Some records of crime*, 2 vols, London.
- Heyd, U., 1973. *Studies in old Ottoman criminal law*, V.L. Menage (ed.), Oxford, Clarendon Press.
- Heynes, B., 1814. *Tracts historical and statistical on India with journals of several tours through various parts of the peninsula*, London.
- Hobsbawm, E.J. and Ranger, T. (eds), 1983. *The invention of tradition*, Cambridge, CUP.
- Hough, W., Major, 1841. *A narrative of the march and operations of the army of the Indus*, London.
- Howell, A., 1868. *Note on jails and jail discipline in India, 1867-68*, Calcutta.

- Huften, O., 1974. *The poor of eighteenth-century France, 1750-1850*, Oxford.
- Humphreys, S., 1985. 'Law as discourse', *History and Anthropology*.
- Hutchins, F.G., 1967. *The illusion of permanence*, Princeton.
- Hutchinson, J., 1835. *A report on the medical management of the jails*, Calcutta.
- 1845. *Observations on the general and medical management of jails and on the treatment of some of the principal diseases which afflict them*, second edition, Calcutta.
- Ignatieff, M., 1978. *A just measure of pain, the penitentiary in the Industrial Revolution, 1750-1850*, London.
- Inalcik, H., 1969. 'Suleiman the law giver and Ottoman law', *Archivum Ottomanicum*, 1.
- Inden, R., 1986. 'Orientalist construction of India', *MAS*, 20, 3 (1986).
- Irvine, W., 1900. 'Etymology of the word Pindhari', *The Indian Antiquary*, May 1900.
- Israel, M. and N.K. Wagle, 1983. *Islamic society and culture*, New Delhi.
- Jackson, W.B., 1854. *General report of a tour of inspection*, Calcutta, Bengal Military Orphan Press.
- Kadam, V.S., 1988. 'The institution of marriage and the position of women in eighteenth century Maharashtra', *IESHR*, xv, 3 (July-September).
- Kaye, J.W., 1853. *The administration of the East India Company; a history of Indian progress*, London.
- 1858. *The life and correspondence of Charles Lord Metcalfe*, vol. I, new and revised edition, London, Smith, Elder and Co.
- 1897. *A history of the sepoy war in India*, Bombay, vol. I.
- Khan, Ali Ibrahim, 1787. 'On the trial by ordeal among the Hindus', communicated by Warren Hastings, *Asiatic Researches*, Calcutta, 1787, vol. I.
- Khan, A.M., 1969. *The transition in Bengal 1756-1775: A study of Sarfaraz Muhammad Reza Khan*, Cambridge, CUP.
- Khan, Panchkouree (pseud), 1857. *The revelations of an orderly*, Calcutta.
- Kincaid, D., 1938. *British social life in India 1608-1937*, reprint, 1939, London, George Routledge and Sons.
- King, Blair, *Partner in empire, Dwarkanath Tagore and the age of enterprise in Eastern India*, Calcutta, Firma KLM, 1981.
- Knox, G.E., 1873. *The criminal law of the Bengal Presidency*, Calcutta, Thacker Spink and Company, vol. I.

- Kolff, D.H.A., 1990. *Naikar, Rajput and Sepoy, the etno-history of the military labour market in Hindustan, 1450-1850*, Cambridge, CUP.
- Kolff, D.H.A. and C.A. Bayly (eds), 1986. *Two colonial empires: Comparative essays on the history of India and Indonesia in the nineteenth century*, Dordrecht, Martinus Nijhoff Publishers.
- Kumar, D., 1965. *Land and caste in South India*, Cambridge University Press.
- Lal, Mohan, 1971. *Travels in the Panjab, Afghanistan and Turkistan, in Balkh, Bokhara, and Herat and a visit to Great Britain and Germany*, 1846, reprint, Punjab, Language Department.
- Langbein, J.H., 1977. *Torture and the law of proof: Europe and England in the ancien regime*, Chicago, University of Chicago Press.
- Laquer, T.W., 1989. 'Crowds, carnival and the state in English execution, 1604-1868', in A.L. Beier, D. Cannadine and J.M. Rosenheim (eds), *The first modern society: Essays in English history in honour of Lawrence Stone*, Cambridge.
- Law, Thomas, 1792. *A sketch of some late arrangements and a view of the rising resources in Bengal*, London.
- Lawrence, Lord John, 1878. 'Murder of Commissioner Fraser — Delhi 1835. A tale of circumstantial evidence', *Blackwood's Edinburgh Magazine*, CXXIII, DCCXLVII (January).
- Lee-Warner, W., Sir, 1979. *The native states of India*, 1910, reprint, New Delhi.
- Leupolt, C.B., 1856. *Recollections of an Indian missionary*, London.
- Lunt, J. (ed.), 1875. *From sepoy to subedar, being the life and adventures of subedar Sita Ram, a native officer of the Bengal Army written and related by himself*, reprint, London, 1988.
- MacDonald, M., 1986. 'The secularisation of suicide in England 1660-1800', *Past and present*, 111 (May).
- Macleod, J.M., 1848. *Notes on the report of the Indian Law Commissioners*, 23 July 1846, London.
- Macpherson, J., 1854. 'Report on insanity among Europeans in Bengal', *The Indian Annals of Medical Science*, April.
- Majumdar, J.K., 1941. *Rammobun Roy and progressive movements in India, a selection from records (1775-1845)*, Calcutta, Art Press.
- Majumdar, N., 1960. *Justice and police in Bengal 1765-1793. A study of the Nizamat in decline*, Calcutta.
- Malcolm, J., 1823. *A memoir of Central India including Malwa and adjoining provinces*, 2 vols, London.
- Malik, Zahir Uddin, 1975. *The reign of Mubammad Shah*, New Delhi.
- Mani, L., 1986. 'Production of an official discourse on sati in early nineteenth-century Bengal', *EPW*, xxi, 17 (April).

- Mani, L., 1987. 'Contentious traditions: The debate on sati in colonial India', *Cultural critique* (Fall).
- Marshall, P.J., 1970. *The British discovery of Hinduism in the eighteenth century*, Cambridge, CUP.
- 1975. 'British expansion in India in the eighteenth century: a historical revision', *History*, 60, 198 (February).
- 1987. *Bengal the British bridgehead: Eastern India 1740–1828*, The New Cambridge History of India, Cambridge, CUP.
- Martin, R.M., 1838. *The history, antiquities, topography and statistics of eastern India*, 2 vols, London.
- Mason, Philip, 1974. *A matter of honour, an account of the Indian galleys and their officers and men*, London.
- McGowan, R., 1982. 'The image of justice and reform of the criminal law in early nineteenth-century England', *Buffalo Law Review*, 32.
- 1986. 'A powerful sympathy: Terror, the prison and humanitarian reform in early nineteenth-century Britain', *Journal of British Studies*, 25, 3 (July 1986).
- 1987. 'The body and punishment in eighteenth-century England', *Journal of Modern History*, 59 (December).
- McLane, J.R., 1993. *Land and local kingship in eighteenth century Bengal*, CUP.
- Metcalf, B.D., 1982. *Islamic revival in British India: Deoband, 1826–1900*, Princeton, Princeton University Press.
- Metcalf, T.R., 1965. *The aftermath of revolt, India, 1857–70*, Princeton, NJ.
- Mishra, K.P., 1975. *Banaras in transition (1738–1795)*, New Delhi.
- Misra, B.B., 1953. *The judicial administration of the East India Company, 1765–1781*, Patna.
- 1959. *The central administration of the East India Company, 1773–1834*, Manchester.
- Mittal, A.K., 1986. *British administration in Kumaon Himalayas*, Delhi, Mittal Publications.
- 'Moderator', 1838. *On British interference with the religious observances of the natives of India*, London.
- Moor, E., 1811. *Hindu Infanticide*, London.
- Moore, W., 1859. *Report on female infanticide*, London, Cox and Wyman.
- Moreland, W., 1911. *The revenue administration of the United Provinces*, reprint, Delhi, 1984.
- Mouat, F.J., 1856. *Reports on jails visited and inspected in Bengal, Behar and Arracan*, Calcutta.

- Mouat, F.J., 1862. 'On prison statistics and discipline in Lower Bengal', *JSSL* (June).
- 1863. *Adventures and researches among the Andaman islanders*, London.
- 1872. 'On prison discipline and statistics in lower Bengal', *JSSL*, xxxv (March).
- Mukharya, P.S., 1979. *The administration of Lord Auckland in India, 1836–42*, Calcutta.
- Mukherjee, R., 1982. 'Trade and empire in Awadh 1765–1804', *Past and present*, 94.
- Nair, J., 1996. *Women and law in colonial India, a social history*, New Delhi, Kali for women.
- Nigam, S., 1990. Part 1: 'Disciplining and policing the "criminals by birth" '; Part 2: 'The development of a disciplinary system, 1871–1900', *IESHR*, xxvii, 2–3.
- O'Brien, P., 1982. *The promise of punishment: Prisons in nineteenth century France*, Princeton.
- O'Hanlon, R., 1994. *A comparison between women and men, Tarabai Shinde and the critique of gender relations in colonial India*, Delhi, OUP.
- Oldenburg, V., 1991. 'Lifestyle as resistance: The case of the courtesans of Lucknow', in D. Haynes and G. Prakash (eds), *Contesting power, resistance and everyday social relations in South Asia*, Delhi, OUP.
- Oldham, W., 1870. *Historical and statistical memoir of the Ghazeepeer district*, Allahabad, parts I and II.
- Orme, R., 1772. *Historical fragments of the Mughal empire, of the Morattoes, and of the English concerns in Indostan*, 1782, reprint, New Delhi.
- Panigrahi, L., 1972. *British social policy and female infanticide in India*, New Delhi.
- Parbury, G., 1841. *Handbook for India and Egypt, comprising the narrative of a journey from Calcutta to England*, London.
- Parkes, F., 1850. *Wanderings of a pilgrim in search of the picturesque*, 2 vols, London.
- Pateman, Carole, 1988, 1991. *The sexual contract*, Cambridge, Polity Press.
- Patra, A.C., 1962. *The administration of justice under the East-India Company in Bengal, Bihar and Orissa*, London.
- Peers, Douglas M., 1991. 'Torture, the police, and the colonial state in the Madras Presidency, 1816–55', *Criminal justice history*, 12.
- 1995. 'Sepoys, soldiers and the lash: Race, caste and army

- discipline in India, 1820–50', *The Journal of Imperial and Commonwealth History*, 23.
- Peggs, J.D., 1830. *Pilgrim tax in India*, second edition, enlarged, London.
- Pennant, T., 1848. *The view of Hindoostan*, 1, London.
- Penner, P., 1986. *The patronage bureaucracy in North India, the Robert M. Bird and James Thomason school, 1820–1870*, Delhi.
- Perlin, F., 1981. 'The pre-colonial Indian state in history and epistemology: A reconstruction of societal formation in the western Deccan from the fifteenth to the early nineteenth century', H.J.M. Claessen and P. Skalnik, *The study of the state*, Hague, Mouton.
- Philips, C.H., 1940. *The East India Company 1784–1834*, Manchester, Manchester University Press.
- (ed.), 1977. *The correspondence of Lord William Cavendish Bentinck*, 2 vols, Oxford, OUP.
- Philips, C.H. and Wainwright, M.D., 1976. *Indian society and the beginnings of modernisation c. 1830–1850*, School of Oriental and African Studies, University of London.
- Piggot, Theodore, 1930. *Outlaws I have known and other reminiscences of an Indian judge*, Edinburgh and London.
- Pinney, T., 1976. *The letters of T.B. Macaulay*, III, CUP.
- Potts, E.D., 1967. *British baptist missionaries in India 1793–1837*, Cambridge.
- Powell, Avril A., 1993. *Muslims and missionaries in pre-mutiny India*, London Studies on South Asia, No. 7, Curzon Press.
- Prakash, G., 1989. *Bonded histories: Genealogies of labour servitude in colonial India*, South Asian Studies, No. 44, Cambridge, CUP.
- Prinsep, J. 'Census of the city of Benares', *Asiatic Researches*, xvii.
- Prichard, I., 1972. *The Chronicles of Budgepore or sketches of life in native India*, Delhi, Manohar reprints.
- Rabito, N., 1974. 'Administrative modernisation and the Bhats of Gujarat, 1800–1820', *IESHR*, xi, 1 (March).
- Radhakrishna, M., 1989. 'The Criminal Tribes Act in the Madras Presidency: Implications for itinerant trading communities', *IESHR*, xxvi, 3 (July–September).
- Radzinowicz, Leon, 1968. *A history of English criminal law and its administration from 1750*, vol. 4, London.
- Radzinowicz, L. and R. Hood, 1986. *A history of English criminal law and its administration*, vol. 5, London.
- Raikes, C., 1852. *Notes on the North Western Provinces of India*, London.
- Rammohun Roy, 1947. *The English works of Raja Rammohun Roy*, part III, K. Nag and D. Burman (eds), Calcutta, Sadharan Brahmo Samaj.
- Rana, R.P., 1987. 'A dominant class in upheaval: The zamindars of a North Indian region in the late seventeenth and early eighteenth century', *IESHR*, xxv, 4 (October–December).
- Rankin, G.C., 1946. *Background to Indian law*, CUP.
- Rao, V.D., 1958. 'A note on the police of the city of Poona', xxxvi, *Journal of Indian History*.
- Ray, A., 1990. *The rebel Nawab of Oudh*, Calcutta, K.P. Bagchi and Company.
- Reynolds, Lt., 1836. 'Notes on the T'hags', *JRAS*, iv.
- Richards, J.F., 1975. *Mughal administration in Golconda*, Oxford.
- 1986. *Document forms for official orders of appointment in the Mughal Empire*, transl., notes and text, E.J.W. Gibb memorial series, new series, xxix, Cambridge.
- Richards, J.F. and V.N. Rao, 1980. 'Banditry in Mughal India: Historical and folk perceptions', *IESHR*, xvii, 1 (January–March).
- Richardson, D. Capt., 1801. 'An account of the Bazeegurs, a sect commonly denominated Nuts', *Asiatic Researches*, vii, Calcutta.
- Rosselli, J., 1974. *Lord William Bentinck. The making of a liberal imperialist, 1774–1839*, Sussex University Press.
- Rubin, Gayle, 1990. 'The traffic in women, notes on the "political economy of sex"', in Karen V. Hansen and Illene J. Philipson (eds), *Women, class, and the feminist imagination*, Philadelphia, Temple University Press.
- Sabeen, D., 1984. *Power in the blood: Popular culture and village discourse in early modern Germany*, Cambridge, CUP.
- Sangar, S.P., 1967. *Crime and punishment in Mughal India*, Delhi.
- Sanyal, S.N., 1979. *Benares and the English East India Company, 1764–1794*, Calcutta.
- Sarkar, J.N., 1921. *Mughal administration*, Patna University lectures, second series.
- 1925. *Anecdotes of Aurangzeb*, Calcutta.
- Sarkar, T., 1993. 'Rhetoric against age of consent and the death of a child-wife', *EPW*, 28, 36, 4 September 1993.
- 1995. 'The Hindu wife and the Hindu nation: Domesticity and nationalism in nineteenth century Bengal', *Studies in History*, 8, 2, n.s.
- Sattin, A. (ed.), 1986. *An Englishwoman in India, the memoirs of Harriet Tytler 1828–1858*, Oxford, OUP.
- Sen, S.N. (ed.), 1949. *Indian travels of Thevenot and Careri*, New Delhi, National Archives of India.

- Seton-Karr, W.S., 1893. *Rulers of India: The Marquess Cornwallis*, Oxford.
- Shakespeare, J., 1820. 'Observations regarding Badheks and Th'egs', *Asiatic Researches*, XIII.
- Sharma, R.C., 1976. 'Aspects of public administration in Northern India in the first half of the seventeenth century', *Journal of Indian History*, LIV, part 1 (April).
- Sherwood, Dr, 1820. 'Of the murderers called P'hansigars', *Asiatic Researches*, XIII.
- Shore, F.J., 1837. *Notes on Indian affairs*, 2 vols, London.
- Sharpe, J.A., 1982. 'The history of crime in late medieval and early modern England: A review of the field', *Social History*, 7, 2 (May 1982).
- Siddiqi, Z., 1969. 'The institution of the Qazi under the Mughals', *Medieval India, a miscellany*, vol. 1, Aligarh Muslim University.
- 1972. 'The intelligence services under the Mughals', *Medieval India, a miscellany*, Aligarh Muslim University.
- Singh, Chetan, 1988. 'Centre and periphery in the Mughal state: The case of seventeenth century Punjab', *MAS*, 22, 2.
- Singha, R., 1993. 'The privilege of taking life: Some "anomalies" in the law of homicide in the Bengal Presidency', *IESHR*, 30, 2.
- 1993. 'Providential circumstances: The thuggee campaign of the 1830s and legal innovation', *MAS*, 27, 1.
- 1995. '“No needless pains or unintended pleasures”: “Penal reform” in the colony', *Studies in history*, 11, 1, n.s.
- Sinha, B.K., 1971. *The Pindaris (1798–1818)*, Calcutta, Bookland.
- Sinha, C.S., 1971. *The Indian civil judiciary in the making, 1800–33*, New Delhi.
- Sinha, D.P., 1969. *Some aspects of British social and administrative policy in India during the administration of Lord Auckland*, Calcutta.
- Sinha, R.M., 1967. *Bhonslas of Nagpur: The last phase (1818–1854)*, New Delhi.
- Sinha, S.N., 1974. *Subah of Allababad under the Great Mughals*, Delhi.
- Skipwith, F., 1843. *The magistrate's guide*, Calcutta.
- Sleeman, J.L., 1933. *Thug, or a million murders*, London, Sampson Low, Marston and Co. Ltd.
- Sleeman, W.H., 1836. *Ramaseana, or a vocabulary of the peculiar language used by the Thugs, with an introduction and appendix, descriptive of the system pursued by that fraternity and of the measures . . . adopted by the Supreme Government of India for its suppression*, Calcutta.
- 1837. 'A history of the Gurha Mundala rajas', *Journal of the Asiatic Society of Bengal*, VI, part 2 (July–December).

- Sleeman, W.H., 1839. *Report on the system of Megpunnaism, or the murder of indigent parents for their young children (who are sold as slaves) as it prevails in the Delbie territories, and the native states of Rajpootana, Uthar and Bhurtpore*, Serampore Press.
- 1840. *Report on the depredations committed by the thug gangs of upper and central India, from the cold season of 1836–37, down to their gradual suppression, under the operations of the measures adopted against them by the supreme government in the year 1839*, Calcutta.
- 1844. *Rambles and recollections of an Indian official*, V.A. Smith (ed.), 1915, reprint, Karachi, 1975.
- 1849. *Report on Budhak alias Bagree dacoits and other gang robbers by hereditary profession*.
- 1858. *A journey through the kingdom of Oude in 1849–50*, 2 vols, London.
- Smith, R. Saumarez, 1985. 'Rule-by-records and rule by reports: Complementary aspects of British imperial rule of law', *Contributions to Indian sociology*, 19, 1 (1985).
- Solvyn, F. Baltazard, 1808–1812. *Les Hindous*, 4 vols, Paris.
- Spierenburg, P., 1984. *The spectacle of suffering*, Cambridge.
- Spry, H.H., 1834. 'Some account of the gangmurderers of Central India, commonly called the thugs; accompanying the skulls of seven of them', *The Phrenological Journal and Miscellany*, VIII (December 1832–June 1834), March.
- 1837. *Modern India: With illustrations of the resources and capabilities of Hindustan*, 2 vols, London.
- Srivastava, R.C., 1971. *Development of the judicial system in India under the East India Company*, Lucknow.
- Statham, J., 1832. *Indian recollections*, London.
- Steele, A., 1827. *The law and custom of the Hindoo castes within the Dekhun Provinces*, reprint, 1868, London.
- Stephen, Sir James Fitzjames, 1883. *A history of the criminal law of England*, III, New York, Burt Franklin.
- Stevenson, J.A.R., 1836. 'Some account of the P'Hansigars, or gang-robbers and of the Shudgarshids, or tribes of jugglers', *JRAS*, I, Article XXII.
- Stocqueler, J.H., 1857. *India under the British empire*, reprint, New Delhi, 1992.
- Stokes, E.T., 1959. *The English Utilitarians in India*, London, OUP.
- 1973. 'The first century of British colonial rule in India: Social revolution or social stagnation?', *Past and present*, 58 (February).
- 1980. 'Bureaucracy and Ideology. Britain and India in the nineteenth-century', *Transactions of the Royal Historical Society*, 5th series, XXX.

- Stokes, E.T., 1986. *The peasant armed: The Indian rebellion of 1857*, C.A. Bayly (ed.), Oxford.
- Subrahmanyam, S. and C.A. Bayly, 1988. 'Portfolio capitalists and the political economy of early modern India', *IESHR*, xxv, 4 (October–December).
- Sugarman, D. (ed.), 1983. *Legality, ideology and the State*, London, Academic Press.
- Sutherland, J., 1833. *Sketches of the relations subsisting between the British government in India and the different native states*, Calcutta.
- Sykes, W.H., 1846. 'Statistics of the administration of civil and criminal justice in British India from 1841 to 1844, both inclusive', *JSSL*.
- 1851. 'Expenditure in India on public works from 1837–8 to 1845–6', inclusive, *JSSL*.
- Taylor, P. Meadows, 1839. *Confessions of a thug*, new edition, Oxford, New York, 1986.
- 1882. *The story of my life*, new edition, Edinburgh and London.
- Teignmouth, Baron (John Shore), 1799. 'On some extraordinary facts, customs and practices of the Hindoos', *Asiatic Researches*, iv, London.
- Tennant, W., 1804. *Indian recreations, consisting chiefly of strictures on the domestic and rural economy of the Mahomedans and Hindoos*, 2 vols, 2nd edition, London.
- Thomas, K., 1973. *Religion and the decline of magic*, Harmondsworth.
- Thornton, E., 1837. *Illustrations of the history and practices of the Thugs*, London.
- Tirmizi, S.A.I., 1985. *Autobiography of Lutfullah*, 1857, New Delhi, International Writers Emporium.
- Tone, W.H., 1799. 'Illustrations of some institutions of the Mahratta people', *Asiatic Annual Register* (1798–99).
- Toynbee, G., 1873. *A sketch of the history of Orissa from 1803 to 1828*, Calcutta.
- Trevelyan, C.E., 1837. 'The Thugs or secret murderers of India', *The Edinburgh Review*, lxiv, Edinburgh.
- Tucker, H.C., 1848. *My notebook of rules and regulations, collectory and faujdarry*, Calcutta.
- Tucker, H. St. G., 1853. *Memorials of Indian government*, J.W. Kaye (ed.), London.
- Tucker, F., 1961. *The yellow scarf*, London.
- Twining, T., 1893. *Travels in India a hundred years ago*, London.
- Valentia, George Viscount, 1809. *Voyages and travels to India, Ceylon, the Red Sea, Abyssinia and Egypt*, London.
- Vans Kennedy, Lt. Col., 1835. 'An abstract of Muhammedan law', *JRAS*, vol. II.
- Verelst, H., 1772. *A view of the rise, progress, and present state of the English government in Bengal*, London.
- Walia, U., 1985. *Changing British attitudes towards the Indian states, 1823–35*, New Delhi.
- Washbrook, D.A., 1981. 'Law, state and agrarian society in colonial India', *MAS*, xv, 3.
- 1987. 'Progress and problems: South Asian and social history c. 1720–1860', *MAS*, 22, 1 (1988).
- Weitzman, Sophia, 1929. *Warren Hastings and Philip Francis*, Manchester.
- Wiener, M.J., 1990. *Reconstructing the criminal, culture, law and policy in England, 1830–1914*, Cambridge.
- Williams, D.O., 1982. 'Racial ideas in early Victorian England', *Ethnic and racial studies*, 5.
- Wilson, R.W., 1894. *An introduction to the study of Anglo-Muhammedan law*, London.
- Wink, A., 1986. *Land and sovereignty in India: Agrarian society and politics under the eighteenth century Maratha Suvarajya*, Cambridge, CUP.
- Yang, A.A. (ed.), 1985. *Crime and criminality in British India*, Tucson, University of Arizona Press.
- 1987. 'Disciplining "natives": Prisons and prisoners in early nineteenth century India', *South Asia*, x, 2 (December), new series.
- 1989. 'Whose sati? Widow-burning in early nineteenth century India', *Journal of Women's History*, 1, 2 (Fall).
- 1989. *The limited Raj: Agrarian relations in colonial India, Saran district, 1793–1920*, Berkeley, Los Angeles, London, University of California.

Printed Sources: Official Publications

Parliamentary Papers (House of Commons)

- PP, 1812–13, vol. 9, vol. 10
- PP, 1819, vol. 12, vol. 13
- PP, 1821, vol. 18
- PP, 1830, vol. 6, vol. 28
- PP, 1831–32, vol. 9, vol. 12
- PP, 1836, vol. 40
- PP, 1837, vol. 43

- PP, 1837-38, vol. 41
 PP, 1837-38, vol. 51
 PP, 1841, vol. 28 and Appendices
 PP, 1847-48, vol. 28
 PP, 1852, vol. 12
An abstract of the regulations enacted for the administration of the police and criminal justice, in the provinces of Bengal, Behar and Orissa, 1793-1824, compiled by W. Blunt, continued by H. Shakespeare, Calcutta, 1824.
A calendar of oriental records, vols I-III, U.P. state records series, Allahabad, 1955-1959.
Calendar of Persian correspondence, Vol. V (1776-80) to Vol. XI (1794-1795), Imperial Record Department, National Archives of India, Calcutta, Delhi.
 Carrau, J., 1855. *The circular orders of the court of Nizamut Adawlut, 1796-1853*, Bengal Military Orphan Press, Calcutta.
Circulars passed by the Sudder Faujdari Adawlut, I, Bombay.
 Clarke, R., 1854. *Regulations of the Government of Fort William in Bengal, 1793-1853*, 3 vols, London.
 Colebrooke, J.E., 1807. *A digest of the regulations and laws enacted by the Governor General in Council for the civil government of the territories*, vol. I, and Supplement, Calcutta.
Constructions by the courts of Sudder Dewanny and Nizamut Adawlut, 2 vols, Calcutta, Bengal Military Orphan Press, 1840.
 Datta, K.K. (ed.), 1954. *Selections from unpublished correspondence of the Judgemagistrate and the Judge of Patna, 1790-1857*, Patna.
 — (ed.), 1968. *Selections from the judicial records of the Bhagalpur district office (1792-1805)*, Patna.
District Gazetteer, Ballia.
District Gazetteer, Ghazipur.
District Gazetteer, Jaunpur, Allahabad, 1908.
District Gazetteer, Mirzapur, Allahabad, 1909.
 Forrest, G.W., 1890. *Selection from the letters, despatches and other state papers preserved in the Foreign Department of the Government of India, 1772-1785*, vol. 2, Calcutta.
Indian Penal Code, 1861.
 Long, J., Revd., 1793. *Selections from the unpublished records of Government, for the year 1748-1767 inclusive*, Calcutta.
 Macnaghten, W.H., 1827. *Reports of cases determined in the Nizamut Adalat*, vol. I, 1801-1819, vol. II, 1820-26, Calcutta.
 Sinha, N.K. and A.K. Dasgupta (eds), 1964. *Selections from Ochterlany*

- papers (1818-25) in the National Archives of India*, University of Calcutta.
The darogha's manual, comprising also the duties of landholders in connection with the police, compiled by J.C. Marshman, Serampore Press, 1850.
Papers relating to East India affairs, correspondence on Hindu infanticide and of all proceedings of the Indian government, with regard to that practice, 1789-1820, House of Commons, 17 June 1824.
Papers relating to East India Affairs (1821-1830), House of Commons, vol. I.
Papers relating to the practice of female infanticide in India, 1834-1842, House of Commons, 1843.
 Pharaoh, J.B., *The circular orders of the court of Foujdaree Udahut, 1805-1846*, Madras, 1847.
Press list of 'Mutiny Papers', Imperial Record Department, Calcutta, 1921.
Report of the committee on prison discipline, Calcutta, 1838.
Report of the Inspector of Prisons on the management of the jails from 1845-1851, Agra, 1852.
Report of the committee on the improvement of the mofussil police in Bengal, 1838.
Report of the commissioners for the investigation of alleged cases of torture in the Madras Presidency, part I, Madras, 1855.
Report of the police administration in the North Western Provinces for the year 1862, Allahabad, 1863.
Report of the revision of the records of part of Ballia district, 1882-1885, Allahabad, 1886.
Reports of criminal cases determined in the court of Sudder Foujdaree Adawlut of Bombay, 1827-46, vol. I, Bombay, 1849, compiled by A.F. Bellasis.
Report on a scheme of pleading and procedure, with forms of indictment adapted to the provisions of the Penal Code, Calcutta, 1848.
 Roy Choudhary, P.C. (ed.), 1958. *Gaya old records*, Patna.
Rules for the better management of the public jails, Calcutta, 1828.
 Saletore, G.N., 1956. *Banaras affairs*, vol. I, Allahabad.
 — 1959. *Banaras affairs (1811-1858)*, vol. II, Allahabad.
Second report from the Select Committee on the administration of justice in India, 5 February 1782, Reports from committees of the House of Commons, vol. V, 1804.
Selections from educational records, 1781-1839, part I, Calcutta, 1920.
Selections from the judicial records of the Bhagalpur district office (1792-1805).

Selections from the records of the Government of the North Western Provinces, vols II and III.

Selections of papers from the records at the East India House, relating to the revenue, police, and civil and criminal justice under the Company's governments in India, 4 vols, London, 1820-26.

Seventh report from the committee of Secrecy on the state of the East India Company, 6 May 1773, Reports from the committees of the House of Commons, vol. IV, 1772-1773.

Shakespeare, A., 1873. *Selections from the Duncan records*, 2 vols, Banaras, Medical Hall Press.

Sinha, H.N. (ed.), 1954. *Selections from the Nagpur Residency records*, IV, 1818-1840, Nagpur.

Whalley, P., 1870. *British Kumaon, The law of the extra regulation tracts*.

Manuscripts and Private Papers

India Office Records and Library, London.

Agra Criminal Judicial proceedings, 1834-1836.

Bengal Criminal and Civil Judicial consultations, 1793-1794.

Bengal (Criminal) Judicial consultations, 1795-1816.

Bengal (Criminal) Judicial consultations, Lower Provinces, 1834-41.

Bengal Judicial consultations, 1841-46.

Bengal Revenue Judicial consultations, 1790-1793.

Board's Collections, 1796-1830, 1845-46.

Broughton papers, Mss Eur F.213.

Buchanan-Hamilton Mss Eur D.91.

Criminal Judicial consultations, Western Provinces, 1816-1834.

E.A. Reade, Mss 418.

Edward Strachey Mss Eur F.128.

Francis Fowke Mss Eur G.3.

H. Wellesley correspondence, Mss Eur F.178.

Home Miscellaneous collections

Indian Legislative Consultations.

Mufti Ghulam Hazrat, '*Kawa-if-i-zilla-Gorakhpur*', Persian Ms No. 4540 (English translation).

North Western Provinces Criminal Judicial proceedings, 1836-1844.

Orme Mss, India, vols VI, XVII, XVIII.

Selected records from the Central Provinces Secretariat relating to the suppressions of Thuggee 1829-1832, Mss Eur D.1188.

British Museum and Library

Auckland Mss 1836-42 Addl Mss 37709-13, 37714.

Broughton Mss 43744-65, 61826-9.

J. Paton Addnl Mss.

W.E. First Baron Auckland (1744-1814) Addl Mss 34,467.

Warren Hastings Addnl Ms 29,210.

Cambridge University Library

History of Jaunpur, Addl Mss 3866.

Letter books of Thomas Perry, 1808-22, Addl Mss 5379, 5380.

National Archives of India, Delhi

Despatches to the Court of Directors, 1834-35, 1838, 1842-44.

Foreign and Political Dept., 1830-49.

Home Dept., Judicial, 1835-45.

Home Misc., Judl, Criminal, June-October 1834.

Home Misc., Legislative, January-June 1837.

Legislative Department, consultations and proceedings (1839-1843).

Medical Board proceedings, 1840-1843.

Thagi and Dakaiti Dept., 1829-59.

Uttar Pradesh State Archives, Lucknow

Commissioners Office Kumaon, Pre-Mutiny.

Regional State Archives, Allahabad

Banaras Collectorate, Pre-Mutiny Commissioners Office.

Banaras, Pre-Mutiny.

Commissioners Office, Allahabad, Pre-Mutiny.

Commissioners Office, Gorakhpur, Pre-Mutiny.

Duncan Records, 1788-99.

Ghazipur Collectorate, Pre-Mutiny.

Gorakhpur Collectorate, Pre-Mutiny.

Mirzapur Collectorate, Pre-Mutiny.

Proceedings of the Resident, Banaras, 1786-96.

Saharanpur collectorate, Pre-Mutiny.

West Bengal State Archives, Calcutta

Bengal (Criminal) Judicial consultations

Bengal Judicial consultations.

Board of Revenue, Police, 1794-1797.

Maharashtra State Archives, Bombay

Judicial Department, 1821-48, selected files.

Tamil Nadu State Archives, Madras

Judicial Department proceedings, 1827-39, selected volumes.

Unpublished Dissertations

Chander, S., 1987. 'From pre-colonial order to princely state, Hyderabad, 1740-1860', Ph.D., Cambridge.

Hjejle, B., 1958. 'The social policy of the East India Company with regard to sati, slavery, thagi and infanticide, 1772-1858', D.Phil., Oxford.

Howlett, D.J., 1981. 'An end to expansion: Influences on British policy in India, c. 1830-60', Ph.D., Cambridge.

Nigam, S., 1987. 'A social history of a colonial stereotype: The criminal tribes and castes of Uttar Pradesh 1871-1930', Ph.D., School of Oriental and African Studies, University of London.

*Contemporary Journals**Asiatic Annual Register**Asiatic Journal**Asiatic Researches**Calcutta Review**Journal of the Royal Asiatic Society**Journal of the Statistical Society of London**North Indian Notes and Queries*

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